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ABSTRACT

Judicial decisions resulting from suits brought under provisions of the United States Constitution and the various civil rights statutes continue to have a significant impact on personnel administration. The 1972 amendments of Title VII of the Civil Rights Act of 1964, which brought State and local governments within the scope of Title VII, have made it important for State and local officials to become knowledgeable of evolving case law in the area of employment discrimination. The summaries in this book are designed to assist in doing this. They represent a cross section of civil rights court cases dealing with personnel administration. One hundred forty-two cases are abstracted. The cases were presented to the Supreme Court of the United States or to one of the eleven Federal circuit courts. Each summary presents the facts and issues surrounding each case as well as a discussion of the decision and its implications. (Author/MK)

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Court Cases

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INTRODUCTION

Judicial decisions resulting from suits brought under provisions of the U.S. Constitution and the various Civil Rights statutes continue to have a significant impact on personnel administration. The 1972 amendments to Title VII of the Civil Rights Act of 1964, which brought State and local governments within the scope of Title VII, have made it important for State and local officials to become knowledgeable of evolving case law in the area of employment discrimination. The summaries in this book are designed to assist in doing this. They represent a cross section of civil rights court cases dealing with personnel administration. This book is not an exhaustive discussion of all relevant cases and the summaries are not necessarily definitive statements of the court decisions. Where such information is needed, users should rely on the decisions themselves. In the 1979 edition of EEO Court Cases, we have not included summaries of U.S. District Court Cases because they lack the authority and precedential value of appellate decisions.

This book is the result of a cooperative effort between the Office of the General Counsel (OGC) and the Office of Intergovernmental Personnel Programs (OIPP). The major portion of the research and writing was done by Steven E. Abow, JD, an OIPP staff member. OIPP would like to express its appreciation to Sandra H. Shapiro, Assistant Deputy General Counsel, Office of the General Counsel, for reviewing the manuscript and for her helpful suggestions. Typing of the manuscript was done by Trudi Key and Lugenia Shaw.

OIPP intends to update this publication on an annual basis. We hope that EEO Court Cases will help you to develop effective programs to assure equal employment opportunity consistent with the law.

We welcome your comments and suggestions, which should be addressed to Steven Abow, Office of Intergovernmental Personnel Programs, Office of Personnel Management, Post Office Box 14184, Washington, D.C., 20044.

The Office of Intergovernmental Personnel Programs provides assistance in the development of equal employment opportunity programs through its grant-in-aid authority under which affirmative action programs have been developed, recruitment techniques have been devised, and selection procedures have been improved. Further, the revised Standards for a Merit System of Personnel Administration, which are a condition of grant-in-aid in approximately 21 programs, stress equal employment opportunity and provide for technical assistance in this vital area.

For information about assistance under these programs, contact the appropriate regional office of the United States of America Office of Personnel Management.

Norman Beckman
Assistant Director for Intergovernmental
Personnel Programs

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U.S. Supreme Court
GRIGGS v. DUKE POWER CO.

401 U.S. 424 (1971)

FACTS: Plaintiffs brought this class action under Title VII of the Civil Rights Act of 1964 alleging that defendant's requirements of a high school diploma and passing intelligence tests as conditions of employment and promotion constitute discrimination. Prior to the effective date of Title VII, defendant openly discriminated in the hiring and assigning of employees. Blacks were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other departments. In 1965, defendant permitted blacks to transfer to other departments but at the same time required that an employee possess a high school diploma in order to transfer from the Labor Department to the other areas of employment. Defendant also instituted a requirement that employees desiring to transfer to other departments and new employees qualifying for placement in any but the Labor Department pass two aptitude tests - the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. The passing scores used by the company approximated the national median for high school graduates, thus effectively screening out half of the applicants who possessed high school diplomas.

ISSUES: (1) Is discriminatory intent required to violate Title VII? (2) Under Title VII, what is required of a test that is given controlling force in employment decisions?

DISCUSSION: The purpose of Title VII is to achieve equality of employment opportunities. But Congress has not mandated that discriminatory preference be given to minorities in order to obtain this goal. Rather, tests or other hiring practices must be removed when it is shown that they discriminate on the basis of race or any other impermissible classification. Proof of discriminatory intent is not required. The consequences of the employment practice and not the motivation is the key to a Title VII violation. If the plaintiff proves that the employment practice has a disproportionate impact on blacks, then the practice must be eliminated unless the defendant can show that the practice is demanded by business necessity. The court held that the use of tests or other measuring procedures is a business necessity only when they are shown to be a reasonable measure of job performance. The court also concluded that the EEOC guidelines on test validation, which interpret section 703 (h) of Title VII, comported with Congressional intent of what a "reasonable measure of job performance" requires. Based on the evidence, neither the high school requirement nor the general intelligence test was shown to bear a demonstrable relationship to successful performance of the job for which it was used. Therefore, even though they are neutral in intent, they cannot be upheld.

U.S. Supreme Court
ESPINOZA v. FARAH MANUFACTURING CO., INC.

414 U.S. 86 (1973)

FACTS: Plaintiff is a lawfully admitted resident alien who is a citizen of Mexico. Defendant refused to hire plaintiff because of a longstanding company policy against the employment of aliens.

ISSUE: Does the refusal to hire based on noncitizenship constitute discrimination on the basis of "national origin" under section 703 of Title VII of the Civil Rights Act of 1964?

DISCUSSION: The statute's legislative history supports the construction of the term "national origin" as referring to the country where a person was born or the country from which his or her ancestors came. EEOC guidelines (29 CFR 1606.1 (d) state that discrimination based on citizenship may have the effect of discriminating on the basis of national origin and therefore should be prohibited. This may be significant in situations where citizenship is but one part of a wider scheme of national origin discrimination, but it does not apply in this case. The defendant's policy against employment of aliens does not have the effect of discriminating on the basis of Mexican national origin. In fact, statistics indicate that persons of Mexican ancestry make up 97 percent of those doing the same work for which plaintiff applied at the company's San Antonio division. Although EEOC's interpretation of the statute is entitled to great deference, when there are "compelling indications that it is wrong," as applied to the facts of the case, courts need not accept that interpretation.

U.S. Supreme Court
MCDONNELL DOUGLAS CORPORATION v. GREEN

411 U.S. 792 (1973)

FACTS: Plaintiff, a black civil rights activist, engaged in disruptive and illegal activity against defendant as part of a protest that his discharge as an employee of defendant and the firm's general hiring practices were racially motivated. Defendant later advertised for qualified personnel and plaintiff applied for re-employment. He was rejected because of his illegal conduct and he filed a complaint with the EEOC charging a violation of Title VII of the Civil Rights Act of 1964. EEOC found reasonable cause to believe that defendant's rejection of plaintiff violated section 703 (a) of the Act which forbids discrimination against applicants or employees who attempt to protest allegedly discriminatory employment conditions. EEOC, however, made no finding on plaintiff's allegation that defendant had violated section 703(a)(1), which prohibits discrimination in any employment decision. Plaintiff brought suit in District Court after efforts at EEOC conciliation proved unsuccessful. The District Court found defendant's illegal activity was not protected by section 704 (a) and dismissed the section 703 (a) (1) claim because EEOC had made no finding regarding it. The Court of Appeals affirmed the section 704(a) ruling, but reversed as to section 703(a)(1) because an EEOC determination of reasonable cause was not a jurisdictional prerequisite to claiming a violation of that provision in federal court.

ISSUES: Can a plaintiff's District Court suit expand charges filed with the EEOC? (2) What constitutes a plaintiff's prima facie case of discrimination in a private, non-class action complaint?

DISCUSSION (1) A complainant's right to bring suit is not confined to charges on which EEOC has made a reasonable cause finding, and the District Court's error in holding the contrary was not harmless because the issues raised under section 703(a)(1) were not identical to those under section 704(a) and the dismissal of the former charge may have prejudiced plaintiff's efforts at trial.

(2) In a private, non-class action complaint charging racial employment discrmination under Title VII, complainant has the burden of establishing a prima facie case, which can be satisfied by a showing that: (a) he is a member of a racial minority, (b) he applied and was qualified for a position the employer was trying to fill, (c) although qualified, he was rejected, (d) the employer continued to seek applicants with complainant's qualifications.

Although the Court of Appeals correctly held that plaintiff proved a prima facie case, it erred in holding that defendant had not discharged its burden of proof in rebuttal by showing that its stated reason for refusing to rehire plaintiff was based on his illegal conduct. On remand, however, plaintiff must be afforded a fair opportunity to prove defendant's stated reason was just a pretext for a racially discriminatory decision.

This can be done by showing that whites engaging in similar illegal activity were retained or hired by defendant. Other relevant evidence could include facts that defendant had discriminated against plaintiff during his employment tenure or pursued a policy of discrimination toward minority employees.

U. S. Supreme Court
FRONTIERO v. RICHARDSON

411 U.S. 677 (1973)

FACTS: Plaintiff, a married woman Air Force officer, alleged that the application of certain statutes amounted to sex discrimination in violation of the 5th Amendment Due Process clause. She had sought increased benefits for her husband as a "dependent" but she failed to meet her burden of proving that her husband was in fact dependent on her for over half of his support. Under the same statute, spouses of male members of the uniformed services are dependents without regard to whether they are in fact dependent upon their husbands for any part of their support. Thus, the statute has a two-fold impact: Procedurally, it requires female members of the uniformed services to satisfy a burden of proof that their husbands are in fact dependent on them, while no such burden is imposed on male members; substantively, it requires that spouses of female members be dependent on such members for half of their support in order that the female member receive additional benefits - no such requirement exists for male members.

ISSUE: Do certain Federal laws which make classifications based upon sex violate the 5th Amendent?

DISCUSSION: Reversing a district court decision, the Supreme Court ruled (8 to 1) that the statutes are unconstitutional. In the court's opinion, four of the justices held that sex, like race and national origin, is an immutable characteristic and so classifications based solely on sex do not reflect individual abilities. Such classifications are therefore inherently suspect and must be subject to close judicial scrutiny. Four other justices, while agreeing that the challenged laws are unconstitutional refused to concur in the opinion that all classifications based on sex are inherently suspect.

U.S. Supreme Court
ALEXANDER v. GARDNER - DENVER CO.

415 U.S. 36 (1974)

FACTS: After plaintiff was discharged by defendant, he filed a grievance, in accordance with a collective bargaining agreement, in which he alleged racial discrimination. When conciliation efforts failed, plaintiff submitted his claim for arbitration, also provided for under the agreement. The arbitrator ruled that plaintiff had been rightfully discharged for cause. In the meantime, plaintiff had also filed a racial discrimination complaint with the EEOC. Following the EEOC determination that there was not reasonable ground to believe that Title VII was violated, the plaintiff brought this action in District Court. Both the District Court and Court of Appeals held that the plaintiff was bound by the arbitrator's decision and could not sue under Title VII.

ISSUE: Is a plaintiff, who has first submitted his cause of action to arbitration proceedings, bound by that determination and foreclosed from bringing suit under Title VII of the Civil Rights Act of 1964?

DISCUSSION: After looking at the legislative history of Title VII and other statutes in this area, the court concluded that it was the obvious Congressional intent of Title VII to supplement rather than supplant existing laws and institutions relating to employment. Therefore, the court found that an individual who seeks arbitration to vindicate a contractual right under a collective bargaining agreement is not foreclosed from initiating a Title VII suit to vindicate an independent statutory right.

The arbitrator's decision may be admitted as evidence, but a District Court, in an action under Title VII, is not confined to reviewing the arbitrator's decision and has a duty to conduct independent factfinding.

U.S. Supreme Court
CLEVELAND BOARD OF EDUCATION v. LaFLEUR

414 U.S. 632 (1974)

FACTS: Pregnant public school teachers in Ohio and Virginia challenged the constitutionality of the mandatory leave regulations of their school boards. The Ohio rule required plaintiff to take unpaid maternity leave five months before her expected childbirth, and to make leave application at least two weeks before her departure. She was not eligible to return to work until the next regular semester after her child reached three months of age. The Virginia rule required one of the plaintiffs to give at least six months notice, and to leave work at least four months, before the expected birth. Re-employment was guaranteed no later than the first day of the school year after she was declared re-eligible. Both rules required a physician's certificate attesting to the teacher's physical fitness before her return. The Court of Appeals for the Sixth Circuit held the Ohio local school board's rule unconstitutional whereas the Court of Appeals for the Fourth Circuit held the Virginia local school Board's rule constitutional.

ISSUE: Do mandatory pregnancy leave regulations that set arbitrary dates for the commencement of leave violate the 14th Amendment?

DISCUSSION: Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th Amendment. Neither the necessity for continuity of instruction or the State interest in keeping physically unfit teachers out of the classroom can justify the sweeping mandatory leave rules. They violate the Due Process Clause because they create irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child. The arbitrary cutoff dates, which come at different times of the school year for different teachers, have no valid relationship to the State's interest in preserving continuity of instruction so long as the teacher is required to give substantial advance notice of pregnancy. The rules conclusively presume that every teacher is physically incapable of teaching when she is four or five months pregnant, when such ability is, in fact, an individual matter and administrative convenience alone cannot validate arbitrary rules. Cleveland's arbitrary and irrational three-month return provision also violates due process in that it creates an irrebuttable presumption that the mother is not fit to resume work. The time limit serves no legitimate State interest and unnecessarily penalizes the female teacher for asserting her right to bear children. This, too, is not germane to maintaining continuity of instruction.

U.S. Supreme Court
GEDULDIG v. AIELLO

417 U.S. 484 (1974)

FACTS: California's disability insurance system pays benefits to persons in private employment because of a disability not covered by workmen's compensation. The system is funded entirely from contributions deducted from wages and participation in the program is mandatory unless employees are protected by a voluntary private plan approved by the State. This action was brought by four women, who otherwise would have qualified for benefits but for an exclusion in the statute of disabilities attributable to pregnancies. A State court decision, which occurred after this action was originally brought, construed the statute's exclusion as applying only to normal pregnancies. Since three of the women suffered abnormal complications as a result of pregnancy, their cases contained no controversy.

ISSUE: Does the California disability insurance program discriminate against women in violation of the 14th Amendment by not paying benefits for disabilities arising from normal pregnancies?

DISCUSSION: In a 6-3 majority opinion, the Supreme Court held that this classification did not violate the Equal Protection Clause. In judging whether there was such a violation, the court held that for social welfare programs, as long as the classification is rationally suppportable, the court will not overturn the State's judgment. Focusing on a cost analysis, the court decided that the State had a legitimate interest in maintaining a self-supporting program. Furthermore, the court noted in a footnote to the decision that the classification under the program was not based upon gender but rather on a dichotomy of pregnant women --nonpregnant person; the court required that actual intent to discriminate against pregnant women be shown before such a classification is labelled sex discrimination under the Constitution.

U.S. Supreme Court

JOHNSON v. RAILWAY EXPRESS AGENCY

421 U.S. 454 (1975)

FACTS: Plaintiff brought suit under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981. He began working for defendant in 1964 as an express handler. In 1967, while employed by defendant as a driver, he filed a charge with the EEOC alleging race discrimination with respect to seniority rules and job assignments. Three weeks later, he was discharged. The EEOC did not render a decision until two years later. Plaintiff did not receive notice of his right to sue under Title VII until nine and on-half months later. The District Court dismissed the 1981 claim as barred by Tennessee's one year statute of limitations.

ISSUES: Does the timely filing of a charge of employment discrimination with the EEOC under section 706 of Title VII stop the running of the period of limitation applicable to an action under 42 U.S.C. 1981 based on the same facts? Can Title VII and 42 U.S.C. 1981 operate concurrently or does the filing of a suit under one statute bar use of the other?

DISCUSSION: 42 U.S.C. 1981 affords a Federal remedy against discrimination in private employment on the basis of race. Both legal and equitable remedies , and in certain circumstances, punitive damages are available. Furthermore, back pay awards under 1981 are not restricted to the two years specified in Title VII. The court held that actions under 1981 are independent of those under Title VII, although the remedies under both statutes are related and directed to basically the same ends. Therefore, the filing of an EEOC charge is not a prerequisite for the institution of a 1981 action, nor does it remove the statute of limitations for a 1981 action. The running of the statute of limitations for a 1981 action begins immediately when the defendant discriminates against the plaintiff and it does not stop running until the plaintiff files a 1981 action with the district court. Although this compels the plaintiff to begin a 1981 suit at the same time the EEOC machinery is operating, plaintiff still has a choice: (1) to file a 1981 action and seek a stay of those proceedings until the EEOC proceedings under Title VII are completed or (2) to proceed with both causes of action at the same time. The court also holds that the statute of limitations for causes of action under 1981 are determined by State law.

U.S. Supreme Court
ALBEMARLE PAPER CO. v. MOODY

422 U.S. 405 (1975)

FACTS: Plaintiff brought a class action suit against their employer alleging violations of Title VII of the Civil Rights Act of 1964 in defendant's preemployment testing and departmental seniority system. Later, plaintiffs also requested back pay as relief. Prior to 1964, defendant maintained segregated departmental lines of progression, reserving the higher paying and skilled jobs for whites. In 1968, these lines were reorganized but this still left the black employees locked in the lower paying job classifications because of the seniority system.

Furthermore, defendant initiated a requirement that applicants for jobs in the skilled lines of progression have a high school diploma and pass two tests. In the lower court decision, defendant was ordered to implement a plant-wide seniority system. The high school diploma requirement was also found to be unlawful. The pre-employment tests, however, were held to be valid. In addition, the court refused to order back pay because defendant had exihibited no bad intent and plaintiff had not filed for back pay until five years after the original charge was filed.

ISSUES: When is it appropriate to grant or deny back pay as relief for past discrimination? How should pre-employment tests be validated in accordance with the intent of Title VII?

DISCUSSION: Back pay: Back pay should be awarded whenever necessary to fulfill the purposes of Title VII. The court determined that Title VII not only intended to eliminate unlawful employment practices, but to make the plaintiff whole again. In this case, the court remanded the issue back to the District Court to determine whether plaintiff's delay in seeking back pay prejudiced the other party.

TESTING: After the plaintiff satisfies his burden of establishing a disproportionate impact on blacks caused by the testing program, the defendant must prove that the tests are job-related. Congress, in Title VII, does not preclude the use of tests; it only requires justification for tests that control employment decisions having a disproportionate impact on minorities. The EEOC Guidelines, which are the administrative interpretation of the Act by the enforcing agency, are entitled to great deference. The court found that the defendant failed to validate the tests in accordance with EEOC procedures. Rather than granting injunctive relief, however, the court remanded the case back to the District Court to determine whether the latest efforts by defendant will satisfy the EEOC Guidelines.

U.S. Supreme Court

FRANKS v. BOWMAN TRANSPORTATION CO., INC

424 U.S. 747 (1976)

FACTS: This class action was brought under Title VII alleging racial discrimination in defendant's hiring and promotion practices with respect to over-the-road (OTR) truck drivers. The class included (1) all black applicants for OTR positions who were refused employment prior to 1972 because of defendant's alleged discriminatory practices and (2) black employees who applied to transfer to OTR positions prior to the same date. The District Court permanently enjoined defendant from perpetuating the discriminatory practices found to exist and ordered that all black applicants who sought to be hired or to transfer to OTR driving positions be notified of their rights to priority consideration for such jobs. The District Court did not, however, grant the specific relief of backpay and seniority retroactive to the date of application. The Court of Appeals ruled the District Court had improperly exercised its discretion in fashioning relief and so offered backpay and retroactive seniority. Seniority relief was limited to black employees who sought and obtained priority consideration for transfer to OTR positions. The Court of Appeals affirmed the District Court's denial of seniority relief to black non-employee applicants who applied for and were denied OTR positions, holding that such relief was barred by section 703 (h) of Title VII which provides it shall not be an unlawful employment practice for an employer to apply different conditions of employment pursuant to a bona fide seniority system.

ISSUE: May identifiable applicants who were denied employment after the effective date of and in violation of Title VII be awarded seniority status retroactive to the dates of their employment application?

DISCUSSION: Reversing the Court of Appeals ruling, the Supreme Court held that section 703(h) is not a bar to seniority relief for applicants who are denied employment because of illegal discrimination. One of the central purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination, and ordinarily retroactive seniority will be necessary to achieve this purpose. Noting that the Court of Appeals apparently followed this reasoning in granting seniority relief to employees who were refused transfer because of discrimination, the court pointed out it could find nothing in Title VII or its legislative history to support making a distinction between employees and applicants. The court also rejected the argument that seniority relief would conflict with the economic interests of other employees by noting that "denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make-whole' objectives of Title VII."

(To support this holding, the court noted similarity with decisions on remedy under the National Labor Relations Act.) While stating that an award of seniority status may not be required in all cases and noting that the fashioning of remedies "invokes the sound equitable discretion of the district courts," the court made clear that such "discretion is vested... to allow the most complete attainment of the objectives of Title VII" and therefore "district courts should take as their starting point the presumption in favor of rightful place seniority relief."

U.S. Supreme Court
WASHINGTON v. DAVIS

426 U.S. 229 (1976)

FACTS: This was a class action suit brought under the 5th Amendment due process clause and 42 U.S.C. 1981, alleging racial discrimination in recruitment, hiring and promotion of police officers in the District of Columbia. The challenge was directed particularly at the written test developed by the U.S. Civil Service Commission for nationwide use and used for the selection of D.C. police officers. Plaintiffs demonstrated that the test had a disproportionate impact on blacks and was not validated. The District Court, noting no claim of intent to discriminate, found that defendant's actions to affirmatively recruit and hire blacks and the fact that the test was a useful indicator of performance in the police training academy were sufficient to conclude that the test was not designed to, and did not, discriminate against blacks.

The Court of Appeals reversed, holding that statutory standards applied in Griggs v. Duke Power Co., 401 U.S. 424 (1971), a Title VII case, also apply in this case under the Fifth Amendment due process clause and that lack of discriminatory intent is irrelevant. The fact that a far greater proportion of blacks - four times as many - failed the test than did whites was sufficient to establish a constitutional violation, unless the test was proved to be an adequate measure of job performance in addition to being an indicator of probable success in the training program.

ISSUES: (1) Do the same standards for determining employment discrimination under Title VII apply to cases brought under the Constitution? (2) Does a test which measures probable success in training, rather than actual job performance, meet the standard of job relatedness?

DISCUSSION: The Supreme Court held that the Court of Appeals erred in applying Title VII standards to the constitutional issue raised in this case. Focusing on the racially differential impact of an employment practice without concern about whether there was intent to discriminate is not the constitutional rule. Both the Fourteenth and Fifth Amendments are aimed at preventing official conduct that discriminates on the basis of race. "Disproportionate impact is not irrevelant but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution." Recognizing that discriminatory purpose may be inferred from "the totality of the relevant facts," including impact, and "even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry," the court held that "the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race."

In the process of deciding this issue, the court noted its disagreement with a number of decisions of the Federal Courts, including cases involving employment discrimination, "to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." Among those decisions are the following which are included in this publication:

Chance v. Board of Examiners
Castro v. Beecher
Bridgeport Guardians v. Bridgeport CSC

Noting that under Title VII employment practices which have a disparate impact must be validated, the court did not adopt this more rigorous standard for the purpose of applying the 5th and 14th Amendments in cases such as this. In connection with test validation, the Court also noted that professional standards provide for three methods of validation and stated, "It appears beyond doubt by now that there is no single method for appropriately validating employment test for relationship to job performance."

On the specific test under challenge, the Supreme Court, agreeing with the District Court, held that "some minimal verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training program." Remand to the District Court to determine whether the training program is sufficiently related to actual performance on the job, as suggested by the Federal parties to the suit, is inappropriate. If there are deficiencies in employment practices under Title VII standards, let them "be directly addressed in accordance with appropriate procedures mandated" by that law.

U.S. Supreme Court
MCDONALD v. SANTA FE TRAIL TRANSPORTATION CO.

427 U.S. 273 (1976)

FACTS: This action was brought under Title VII and 42 U.S.C. 1981. Two white employees were discharged by the company for misappropriating cargo while a black employee, charged with the same offense, was retained. The discharged employees first filed a grievance under a collective bargaining agreement between their union and the company, and later filed charges with EEOC under Title VII, but failed to get relief in either case. They then brought suit under Title VII and 42 U.S.C. 1981 alleging that the company had engaged in racial discrimination in discharging them and that the union had acquiesced in the discriminatory action by not representing one of them in the grievance proceedings. The District Court dismissed their cases ruling that (1) 42 U.S.C. 1981 does not apply to racial discrimination against white persons and (2) the plaintiffs did not raise a claim upon which Title VII relief may be granted. The Court of Appeals affirmed their dismissal, noting in regard to the Title VII claim that "there is no allegation that the plaintiffs were falsely charged."

ISSUES: (1) Did the discharged employees properly state a claim for relief under Title VII? (2) Does 42 U.S.C. 1981 protect white persons from racial discrimination in private employment?

DISCUSSION: The Supreme Court held that the discharged employees had properly stated a claim for relief under Title VII. Title VII prohibits discrimination against "any individual" because of race. "Its terms are not limited to discrimination against members of any particular race." The same standards applied for non whites in McDonnell Douglas v. Green (411 U.S. 792), also apply to whites. Though the company may properly decide to discharge employees for theft, it must apply its policy equally to all races. The union is also liable. Its claim that it is sometimes necessary to compromise in order to secure retention of some discharged employees is rejected when race is a factor in making such a compromise.

The Court also held that 42 U.S.C. 1981 prohibits racial discrimination against white as well as nonwhite persons. Even though section 1981 provides that "all persons...shall have the same right ...as is enjoyed by white persons" which could lend support to the argument that its protection is limited to non whites, the legislative history is clear that its protections were to apply to all citizens.

It should be noted that, in a footnote to its decision, the Court emphasized that it did not consider in this case the permissibility of affirmative action programs, whether judically required or otherwise prompted.

U.S. Supreme Court

MASSACHUSETTS BOARD OF RETIREMENT v. MURGIA

427 U.S. 307 (1976)

FACTS: This suit was brought by an officer of the Massachusetts State Police who alleged that a State law, which called for mandatory retirement of police officers at age 50, denied him equal protection of the laws under the Fourteenth Amendment. While even his expert witnesses conceded a general relationship between advancing age and physical ability to do the job, he had passed a comprehensive physical examination only 4 months prior to his compulsory retirement. These exams are required for police officers by the State every two years until age 40 and once each year between the ages of 40 and 50. The three judge District Court panel held that "compulsory retirement at age 50 was irrational under a scheme that assessed the capabilities of officers individually" and therefore the law is unconstitutional.

ISSUE: Does the State's mandatory retirement age have a sufficiently rational basis to be constitutionally valid?

DISCUSSION: Reversing, the Supreme Court held that the mandatory retirement age does not deny equal protection of the law. Because of the recognized relationship between advancing age and declining physical ability, mandatory retirement at age 50 "clearly is rationally related to the State's objective." Because the State determines fitness individually before age 50 does not mean that the objective is not rationally furthered by maximum age limitation. Where only a rational relationship needs to be shown, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

BROWN v. GSA

425 U.S. 820 (1976)

FACTS: Plaintiff, an employee of the General Services Administration, filed an administrative complaint alleging racial discrimination after the agency's failure to promote him. The agency, in its final decision, found no race discrimination and advised plaintiff of his right to appeal to the U.S. Civil Service Commission's Board of Appeals and Review or to file suit in District Court within 30 days. Plaintiff filed suit in District Court under Title VII, the Declaratory Judgment Act and invoking general Federal question jurisdiction 42 days after the agency's decision. The Court dismissed the suit as untimely filed in that it was not brought within 30 days of final agency action as required by section 717(c) of Title VII. The Court of Appeals affirmed finding that 717 provides the exclusive judicial remedy for complaints of Federal employment discrimination.

ISSUE: Does section 717 of Title VII provide the exclusive judicial remedy for claims of discrimination in Federal employment?

DISCUSSION: Noting that Congress failed explicitly to decide the scope of section 717 "in the constellation of antidiscrimination law" the Supreme Court (in a 6-2 decision) sought out the legislative intent regarding that provision of Title VII. The Court found that the legislative history of the 1972 amendments demonstrated that Congress was persuaded that Federal employees who were treated in a discriminatory manner had no effective judicial remedy and therefore, created an exclusive, pre-emptive administrative and judicial scheme for the redress of Federal employment discrimination. The Court opined that the balance, completeness, and structural integrity of 717, which permitted an aggrieved employee to file a civil action only after exhausting administrative remedies as provided, are inconsistent with plaintiff's contention that the judicial remedy afforded was designed merely to supplement other putative judicial relief. The Court suggested that the careful blend of administrative and judicial enforcement powers could easily be circumvented if courts were immediately accessible under other statutes and various theories of discrimination. The Court held that the rights of Federal employees were not co-extensive with those of employees in the private sector and that a precisely drawn and detailed statute such as 717 pre-empted more general remedies. It accordingly affirmed the judgment of the Court of Appeals.

CHANDLER v. ROUDEBUSH

425 U.S. 840 (1976)

FACTS: An employee of the Veterans Administration applied for a promotion but was not selected. She filed a complaint of race and sex discrimination. Although the administrative complaints examiner recommended a finding of sex but not race discrimination, the agency rejected the proposed finding of sex discrimination and accepted the recommended finding of no race discrimination. The U.S. Civil Service Commission's Board of Appeals and Review affirmed the agency's findings. Complainant timely filed a suit in District Court under section 717(c) of Title VII. In response to complainant's initiation of discovery proceedings, the agency moved for an order prohibiting discovery on the grounds that judicial action authorized by 717(c) is limited to a "review of the administrative record." Plaintiff countered that she had a right under 717(c) to a trial de novo. The District Court held that a trial de novo is not required in all cases and that review of the administrative record is sufficient "if an absence of discrimination is affirmatively established by the clear weight of the evidence in the record." The Court, after applying this standard of review, granted summary judgment for the agency. The Court of Appeals affirmed.

ISSUE: Does Title VII require trial de novo in Federal employment discrimination cases?

DISCUSSION: The Supreme Court noted that private sector employees are entitled under Title VII to a trial de novo. The Court held that inasmuch as Federal employees are entitled by 717(c) to "'file a civil action as provided in section 2000e-5' and since the civil action provided in 2000e-5 is a trial de novo, it would seem to follow syllogistically that Federal employees are entitled to a trial de novo of their employment discrimination claims." However, the Court also took cognizance of the Court of Appeal's reliance on the words "as applicable" in 717(d) as well as the government's contention that routine de novo trial of Federal employees claims would clash with the Act's delegation of enforcement responsibilities to the Civil Service Commission and would conflict with the Supreme Court's view that de novo review is generally not to be presumed.

The Court, construing the words "as applicable" in 717(c), suggested that Congress used this phrase to exclude several procedures enunciated by the Act which could not possibly apply to civil actions involving Federal employees e.g., suits and permissive intervention by EEOC or the Attorney General which only apply to private sector cases. The Court reviewed the legislative history of the 1972 amendments and found that trial de novo was contemplated after exhaustion of administrative review. Further, the Court concluded that its policy that de novo review is generally not to be presumed must defer to a specific statutory authorization of such review such as that contained in 717. The Court accordingly reversed the judgment of the Court of Appeals and remanded for further proceedings.

HAMPTON v. MOW SUN WONG
426 US 88 (1976)

FACTS: Several resident aliens brought suit to challenge the validity of a Civil Service Commission policy which excludes all persons except American citizens and natives of American Samoa from most positions alleging that this practice violated the Due Process Clause of the 14th Amendment. The record showed that each plaintiff was qualified for an available job. The District Court held in favor of the defendant noting that federal power over aliens is "quite broad, almost plenary". The Court of Appeals reversed, holding that regulations which sweep indiscriminately excluding all aliens from all positions could not be upheld.

ISSUE: Is a regulation of the U.S. Civil Service Commission that bars resident aliens from employment in the federal competitive civil service constitutional?

DISCUSSION: The Supreme Court (5-4) noted that the rule enforced by the Commission had an impact on an identifiable class of persons who entirely apart from the rule itself are already subject to disadvantages not shared by the remainder of the community. The disadvantage is of sufficient significance as to be characterized as a deprivation of liberty on a wholesale basis. Such a deprivation must be accompanied by due process under the terms of the 14th amendment. Therefore, some judicial scrutiny is mandated by the Constitution. Neither the Congress nor the President ever required the CSC to adopt the citizenship requirement as a condition for eligibility for employment although due to the rule's longevity it is fair to say that they have acquiesced in it. The court, after reviewing the legislative history of the Pendleton Act, assumed without deciding that Congress and the President have the Constitutional authority to promulgate the regulation in issue and then proceeded to the issue of whether the CSC had the same authority. The court held that the only concern of the Commission is to promote an efficient federal service. Unlike the President and Congress, it has no responsibility for foreign affairs, for treaty negotiations nor for the economic consequences of permitting participation of aliens in employment opportunities. It is fair to assume that its goal would best be served by removing unnecessary restrictions on the eligibility of qualified applicants for employment. Only the administrative desirability of having one single rule excluding all non-citizens where it is manifest that citizenship is an appropriate and legitimate requirement for important and sensitive positions may provide a rational basis for the general rule excluding aliens. That justification is unacceptable in this case. There is no evidence that the CSC made a considered evaluation of the desirability of a simple exclusionary rule nor can it be inferred that the administrative burden of establishing the job classifications for which citizenship is an appropriate requirement would be a particularly onerous task. By broadly denying this class substantial opportunities for employment, the CSC rule deprives its members of an aspect of liberty without due process. The court affirmed the ruling of the Court of Appeals.

The dissenters concluded that Congress, in the exercise of its political judgment, could have excluded aliens from the civil service. The fact that it chose in a separate political decision to allow the CSC to make this determination does not render the governmental policy any less prohibited, and consequently it should not be subject to judicial scrutiny.

TEAMSTERS v. UNITED STATES

431 U.S. 324 (1977)

FACTS: The government brought an action against the employer (trucking company) and the union under Title VII charging a pattern and practice of employment discrimination against Blacks and Spanish surnamed persons as regards practices relating to hiring, salaries, work assignments, promotions, and transfers. The government also challenged the seniority system established by the collective bargaining agreements between the employer and the union. The government sought general injunctive relief and specific "make whole" relief for all victims of discrimination.

The District Court found that the government had shown by a preponderance of the evidence that the employer had engaged in a "plan and practice" of discrimination and that the seniority system contained in the collective bargaining contracts between the company and the union violated Title VII in that it operated to impede the free transfer of minority groups into and within the company. (The court subdivided the affected class of victims of discrimination into three groups. Those who were found to have suffered "severe injury" were to be afforded the opportunity to fill line-driver jobs with complete seniority dating back to the effective date of Title VII. Those who were deemed to be "very possibly the objects of discrimination" and who "were likely harmed" even absent specific evidence of discrimination and injury were ordered to be entitled to fill vacancies in line-driving jobs with competitive seniority as of the date that the government filed the suit in issue. Finally, those members of the class as to whom there was "no evidence" showing that they were named individually were to be given priority consideration for line-driver jobs ahead of all persons except in the two subclasses discussed above. They were not awarded retroactive seniority.)

The Court of Appeals agreed that the employer had engaged in a pattern and practice of employment discrimination and that the seniority system violated Title VII as applied to the victims of prior discrimination but rejected the District Court's tripartite classification of affected employees. (The Court held that all affected incumbent employees could bid for future line-driver jobs on the basis of their company seniority and that once a class member became a line-driver, he could use his full company seniority even if it predated the effective date of Title VII limited only by a "qualification" date formula under which seniority could not be awarded for periods prior to the date when a line-driver job was vacant and the affected employee met the qualifications for the position.)

ISSUE: What is the role of statistics in showing disparate impact? Does section 703(h) immunize the seniority system in question? What is the proper scope of judicial relief?

DISCUSSION: The Supreme Court noted that under section 703(a) of Title VII, the government was alleging that the defendants regularly and purposefully treated blacks and Spanish surnamed applicants and emloyees less favorably than whites. In a footnote, the Court noted that under McDonnell Douglas v. Green, "disparate treatment such as alleged in the present case is the most easily understood type of discrimination." The employer simply treats people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment (the Court distinguished claims of disparate treatment from claims of disparate impact; that is, those concerning employment practices that are facially neutral in their treatment of different groups but which fall more heavily on one group than on another and which cannot be justified by business necessity). Inasmuch as the government had the initial burden of establishing a prima facie case of discrimination, it had to prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. In short, the government had to establish that racial discrimination was the employer's "standard operating procedure." Based on a substantial statistical disparity in the work force and testimony concerning specific instances of discrimination, the Court found that the government had carried its burden of proof. The Court held that statistical analysis served an important role in showing discrimination and that in some cases such as this, statistics alone would suffice to establish a prima facie case. The Court cautioned, however, that statistics are not irrefutable and may be rebutted. The court upheld the decision of the District Court and the Court of Appeals that the employer did not adequately rebut the government's prima facie case.

The Court of Appeals and the District Court had held that the employer's seniority system discriminated against minority employees. Although all employees who transferred into line-driver positions lost all seniority as regards layoffs and choosing particular runs, the lower courts found that black and Spanish surnamed employees suffered the most because many of them had been denied equal opportunity to become line-drivers when they were initially hired and would thus never be able to catch up to the level of a contemporary who had not been subjected to discrimination. The union asserted that the seniority system was immunized from a finding of illegality by reason of section 703(h) of Title VII which permits the application of different terms, conditions, or privileges of employment pursuant to a bona fide seniority system . . . provided that such differences are not the result of an intention to discriminate. The Supreme Court, relying on Franks v. Bowman, stated that "post-Act" victims of discrimination are entitled to relief including retroactive seniority without attacking the legality of the system itself. The Court, while acknowledging that seniority systems could act to freeze the status quo of prior discrimination, held that section 703(h) of Title VII acted to extend a measure of immunity to bona fide seniority systems already in effect and to allow for full exercise of seniority accumulated before the effective date of the Act even where pre-Act discrimination accorded whites greater seniority rights than blacks. Finding the seniority system

in this case to be bona fide, the Court held that the system did not violate Title VII and held that those employees who suffered only pre-Act discrimination are not entitled to relief, and further, found that no person may be given retroactive seniority to a date earlier than the effective date.

Regarding the issue of remedy, the Court held that in a class action, once the plaintiff had proved the existence of a pattern of discrimination, a rebuttable presumption that any particular employment decision made during the period in which the discriminatory policy was in force was made pursuant to that policy came into being, shifting the burden to the employer to dispel that inference regarding individual applicants or employees by showing that its employment practices were lawful with respect to them. The Court held that every post-Act minority applicant for a line-driver position is presumptively entitled to relief subject to a showing by the employer that its individual actions were not based on its policy of discrimination. The Court additionally held that a person could be awarded seniority relief in appropriate cases even though he never actually applied for a job based on the broad equitable power of Title VII courts to fashion the most complete relief possible in eliminating the discriminatory effect of the past and barring like discrimination in the future. (The Court noted that the most pervasive type of discrimination was that which was so successful as to deter job applicants from members of minority groups.) The Court remanded the case to the District Court for further proceedings regarding remedial relief. The Court specifically instructed the District Court to decide which of the employees were actual victims of discrimination and to recreate the conditions and relationships that would have been had there been no unlawful discrimination.

UNITED AIRLINES v. EVANS

431 U.S. 553 (1977)

FACTS: The plaintiff, a flight attendant for defendant, was forced to resign her position in 1968, because of the employer's policy of refusing to allow its female flight attendants to be married. (The Court of Appeals for the 7th Circuit subsequently declared that such a forced resignation violated Title VII but plaintiff was not a party to that case and did not initiate any proceedings of her own in 1968, by filing a charge with EEOC within 90 days of her separation.) In 1972, plaintiff was rehired as a new employee but was treated as if she had no prior service for seniority purposes.

Plaintiff filed suit alleging that the employer was committing a second violation of Title VII by refusing to credit her with seniority for any period prior to that of her reemployment. The District Court dismissed the complaint holding that the failure to file a charge within 90 days in her separation in 1968, caused her claim to be time barred. The Court of Appeals initially affirmed but reconsidered its opinion in light of the Supreme Court's decision in Franks v. Bowman and reversed the District Court.

ISSUE: Did the employer's denial of seniority in 1972 constitute an independant act of discrimination?

DISCUSSION: The Supreme Court reversed the Court of Appeals holding that the seniority system in question did not make any distinction between prior services of male and female employees. The Court conceded that plaintiff was correct in pointing out that the seniority system gives present effect to a past act of discrimination. The Court stated, however, that defendant "was entitled to treat the past act as lawful within the 90 days then allowed by section 706(d). . ."A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before that statute was passed. It may constitute background evidence in a proceeding in which the status of a current practice is at issue but separately considered it is merely an unfortunate event in history which has no present legal consequences..." Noting that plaintiff had not alleged that it treated former employees who were discharged for a discriminatory reason differently than those discharged for a non-discriminatory reason, the Court concluded that the system was neutral on its face. The Court distinguished this case from Franks v. Bowman, which held that retroactive seniority was an appropriate remedy under Title VII "after an illegal discriminatory act or practice had been proved." In this case the Court did not find it necessary to reach the issue of remedy because plaintiff did not file a timely charge based on her 1968 separation. The Court further held that section 703(h) immunizes the seniority system in question because its bona fides had not been challenged.

DOTHARD v. RAWLINSON

433 U.S. 321 (1977)

FACTS: Plaintiff, a woman, applied for a position as a prison guard with the Alabama Board of Correction. When her application was rejected because she failed to meet the 120 lbs. weight requirement and the 5'2" height requirement, she brought a class action under Title VII and the Equal protection clause of the XIVth amendment. While the suit was pending, the defendant adopted a regulation establishing gender criteria for assigning prison guards to maximum security institutions for positions requiring continuing close proximity to inmates. Plaintiff amended her complaint to challenge this regulation.

A three judge Federal District Court found in favor of plaintiff.

ISSUE: Did defendant's height and weight requirements constitute sex discrimination under Title VII?

DISCUSSION: The Supreme Court stated that in a suit challenging facially neutral standards a plaintiff need only show a significantly discriminatory pattern in order to establish a prima facie case of discrimination and thus, shift the burden to the defendant of demonstrating job relatedness. The Court noted that women comprised almost 53% of the workforce in the nation but only approximately 13% of the prison guards in Alabama. The District Court had found that the height requirement operated to exclude one third of the women in the U.S. but only 1.3% of the men. The weight restriction served to exclude approximately 22.3% of women but only 2.4% of men. The Supreme Court rejected defendant's argument that the use of generalized national statistics would not suffice to establish a prima facie case and that statistics concerning applicants would be inadequate in that they would not meet them and would therefore, have a chilling effect on the number of women applicants. Noting that the defendant did not attempt to adduce countervailng statistical evidence, the Court upheld the District Court's finding of a statistical prima facie case of discrimination.

Regarding defendant's attempt to rebut the prima facie case by arguing that the height and weight requirements were related to strength and thus, were job related, the Court found that defendant had produced no evidence correlating height and weight with relative strength nor had a properly validated test (or for that matter any test) been employed. Accordingly, the Court affirmed the District Court's finding that the height and weight requirements violated Title VII.

Regarding the regulation prohibiting the assignment of female guards in all male maximum security correctional facilities, the defendant justified this overt sex discrimination citing Section 703(e) of Title VII which permits such discrimination where sex is a "bona fide occupational qualification" reasonably necessary to the overall operation of the enterprise.

The Court found that the bona fide occupational qualification exception was meant to be an extremely narrow exception to the prohibition of sex discrimination. Nevertheless, the Court concluded (in a split vote) that the

regulation in question fell within the ambit of the 703(e) exception. The Court reasoned that while ordinarily, the argument that a job is too dangerous for a woman may be rebutted by noting that it is the purpose of Title VII to allow the individual to exercise free choice, the ability to maintain order in a male maximum security penitentiary "could be directly reduced by her [the guard's] womanhood." The Court found that under the conditions extant in the prison system under scrutiny (inmate access to guards, understaffed institutions, a substantial portion of the inmate population compised of sex offenders), there are few deterrents to inmate assaults on women prison guards. The Court concluded on this basis that the District Court erred in ruling that being male is not a bona fide occupational qualification for the prison guard position and accordingly reversed this portion of the District Court's judgment.

HAZELWOOD SCHOOL DISTRICT v. U.S.

433 U.S. 299 (1977)

FACTS: The Attorney General brought suit against defendants alleging that they were engaged in a pattern and practice of employment discrimination in violation of Title VII. The plaintiff asked for an injunction requiring them to cease its discriminatory practices, to take affirmative steps to obtain qualified black faculty members and to offer employment and give back pay to victims of past illegal discrimination. Specifically, the government charged that defendants were guilty of a history of racially discriminatory practices, statistical disparities in hiring, subjective hiring procedures and specific instances of discrimination against 55 unsuccessful black applicants for teaching jobs. Defendants offered virtually no additional evidence in response, relying on perceived deficiencies in the government's case and its own policy of hiring regardless of race, color, or creed.

The District Court held that plaintiff failed to establish a pattern or practice of discrimination noting that a dual system of education had never existed in the geographical area in question. The court also noted that although the percentage of black teachers was small, the percentage of black pupils was similarly small. Finally, the District Court found that the government had not sustained its burden of proving intentional discrimination in any of the 55 cases of individual discrimination alleged.

The Court of Appeals reversed finding the District Court's analysis of the statistical data to be irrelevant. The court held that the proper comparison was between black teachers in the school district involved and black teachers in the relevant labor market. The Court of Appeals found a statistical disparity (15% black teachers in the area; 1.8% in the affected area). With respect to the 55 individual cases of alleged discrimination, the court found that the District Court erred in not following the four part test enunciated in McDonnell Douglas v. Green for finding a prima facie case. The Court of Appeals found such a prima facie case of discrimination in 16 of the cases and further found them to be unrebutted and thus, entered judgment for those plaintiffs.

ISSUE: Was the Court of Appeal's finding of a pattern or practice of discrimination i.e., the comparatively small percentage of black employees, lacking in probative force?

[NOTE Plaintiffs allege purposeful discrimination - the issue of patterns of discrimination without intent was not before the Court.]

DISCUSSION: The Supreme Court noted that in the Teamsters case, it found that statistics provide substantial guidance in evaluating the arguments advanced by the defendant and constituted an important source of proof. "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." The Court held that in comparing the racial composition of defendant's teaching staff

and the racial composition of the qualified public school teacher population in the relevant labor market, the Court of Appeals properly analyzed the statistics of record. Nevertheless, the Court held that while the statistical disparties were on their face substantial, the Court of Appeals erred in substituting its judgment for that of the District Court in holding that the government conclusively proved its pattern or practice lawsuit. The court opined that the Court of Appeals had disregarded the possibility that the statistical prima facie case might be rebutted by statistics dealing with defendant's hiring after it became subject to Title VII. The employer must be given the opportunity to show that the discriminatory pattern was a product of pre-Act hiring and that its post-Act employment decision was non-discriminatory. Further evaluation by the trial court is necessary to determine appropriate comparative figures concerning the appropriate labor market in light of all surrounding circumstances.

TRANS WORLD AIRLINES INC. v. HARDISON

432 U.S. 63 (1977)

FACTS: Plaintiff was a member of the Worldwide Church of God which prohibited him from working from sunset Friday until sunset on Saturday. Plaintiff sought assignment to a job where he was second from the bottom on the seniority list. He was asked to work Saturdays when a fellow employee went on vacation. The company agreed to permit the union to seek a change of work assignment but the union was unwilling to violate its seniority provisions. The complainant rejected a proposal that he work only four days a week inasmuch as his job was essential and he was the only employee available on weekends who could perform it. When an accommodation was not reached, plaintiff refused to report for work and he was discharged for insubordination. Plaintiff sued for injunctive relief under Title VII. The District Court ruled in favor of the defendants but the Court of Appeals reversed holding that the company had not satisfied its duty to accommodate.

ISSUE: What is the extent of an employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on a particular day of the week?

DISCUSSION: The Supreme Court reversed the judgment of the Court of Appeals. Taking cognizance of a 1966 EEOC guideline declaring that an employer had an obligation under Title VII "to accommodate to the reasonable religious needs of employees where such accommodation can be made without undue hardship on the employer's business ," the Court nevertheless, found that the statute as well as the guidelines provided no guidance for determining the degree of accommodation that is required. The Court found that in holding several meetings with plaintiff at which it attempted to find a solution to his problems, the company had satisfied its obligation to make a reasonable accommodation. The Court noted that the company was willing to agree to a trade of shifts but that any such change was incompatible with the seniority framework which the union was not willing to violate. The Court noted that the seniority system represented a neutral way of minimizing the number of occasions when an employee must work on a day he would prefer not to and that in recognition of the fact that weekend work schedules are the least popular , the company made further accommodations by reducing its work force to a bare minimum on those days. The Court cited 703(h) which immunized bona fide seniority systems which were not the result of an intent to discriminate to support its conclusion. The Court concluded that the duty to accommodate does not require the defendant to take steps inconsistant with an otherwise valid collective bargaining agreement. "It would be anomolous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job performance of some employees as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others..." The Court suggested that to do otherwise would involve discrimination against members of a majority religious group. The judgment of the Court of Appeals was reversed.

UNITED AIRLINES v. McMANN

434 U.S. 192 (1977)

FACTS: Plaintiff sued in District Court seeking an injunction, reinstatement, and backpay. He alleged age discrimination concerning his forced retirement at age 60 in accordance with the provisions of a retirement plan to which he belonged.

The District Court granted summary judgment to the defendant. The Court of Appeals reversed finding that a pre-age 65 retirement provision constitutes a "subterfuge" under the Age Discrimination in Employment Act (ADEA) unless the employer can show that the early retirement provision has some essential business purpose, and remanded the case to give the defendant an opportunity to demonstrate such a purpose. The Supreme Court granted certiorari.

ISSUE: Whether under the ADEA of 1967, the retirement of an employee over his objection and prior to reaching age 65 is permissible under the provisions of a bona fide retirement plan established before the enactment of the Act.

DISCUSSION: The Supreme Court noted that section 4(f)(2) of the Act permits an employer to observe the terms of a bona fide employee benefit plan which is not a "subterfuge." Plantiff argued that the provision of the plan was not couched in mandatory language in that it only stated that the "normal retirement date is the first day of the month following the 60th birthday." The Court opined that while the word "normal" is not free from doubt, the evidence adduced showed that in operation, discretion was never exercised to permit an employee beyond the age of 60 to continue working. The Court found that a review of the legislative history of the Act showed that Congress meant to distinguish between discharges and forced retirement under the terms of a bona fide retirement plan. It held that there was nothing to indicate that Congress intended wholesale invalidation of retirement plans instituted in good faith before the passage of the Act or intended to require employers to bear the burden of showing a business purpose to justify bona fide pre-existing plans. The Court defined "subterfuge" to mean a strategem of evasion and accordingly, found that a plan established in 1941, if bona fide, could not be a subterfuge to evade an Act passed 26 years later. The Court reversed the judgment of the Court of Appeals.

U.S. Supreme Court

MONELL v. DEPARTMENT OF SOCIAL SERVICES

436 U.S. 658 (1978)

FACTS: Plaintiffs, a class of female employees of the Department of Social Services, and the Board of Education brought an action under 42 USC 1983 regarding maternity leave policies. The suit sought inter alia, back pay for periods of unlawful forced leave. The District Court held that the acts complained of were unlawful but plaintiff's request for back pay was denied because any such damages would ultimately come from the municipality and would circumvent the immunity conferred upon such bodies by Monroe v. Pape 365 US 167 (1961).

The Court of Appeals affirmed holding that the defendants were not persons under 1983 because they perform a vital governmental function and have no final say in what its appropriations would be. Although the court held that named individual defendants were persons even when sued in their official capacities, they could not be sued because a damage award would have to be paid by a city which was immune from suit.

ISSUE: Are local governmental officials and/or local independent school boards persons within the meaning of 42 USC 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?

DISCUSSION: The Supreme Court overruled Monroe v. Pape insofar as it held that local governments are wholly immune from suit under 1983. After reviewing the legislative history of the Act and the case law, the court concluded that Congress intended municipalities and other governments to be included among those persons to whom 1983 applies.

Therefore, local governing bodies can be sued directly under 1983 for monetary damages or injunctive relief wherein the action that is alleged to be unconstitutional implements or executes a policy statement, order, regulation or decision officially adopted and promulgated by that body's officers. It may be used for constitutional deprivations visited pursuant to governmental custom even though it has not been formally approved through the body's official decisionmaking channels and is not authorized by written law. However, municipalities are to be held liable only because of action taken pursuant to some official municipal policies. It cannot be held liable solely because of an injury inflicted by one of its employees or agents.

UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE

438 U.S. 265 (1978)

FACTS: The Plaintiff challenged the special admissions program of the University of California at Davis Medical School which was designed to insure the admission of a specified number of students from certain minority groups. The faculty had devised a special admissions program to increase the representation of "disadvantaged" students by setting aside a certain number of seats for such applicants. The program provided for a separate committee which reviewed the applications of candidates who indicated that they wished to be considered as economically and/ or educationally disadvantaged and to be considered as members of a minority group (blacks, Chicanos, Asians, and American Indians). The applicants were then rated but their qualifications were not compared to those of the general applicants. Although the program received many applications from white applicants, none was ever admitted and in 1974, the committee explicitly considered only those applicants who were members of a designated minority group.

Plaintiff applied for a position under the general admission program and was twice rejected. He filed suit alleging that the special admission program operated to exclude him from the program on the basis of his race in violation of the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964.

The trial court found that the program violated the U.S. and California Constitutions and Title VI but refused to admit the plaintiff based on his faillure to prove that "but for" the existence of the special program he would have been admitted. The Supreme Court of California held that the Equal Protection Clause of the Constitution required that "no applicant may be rejected because of his race in favor of another who is less qualified as measured by standards applied without regard to race" and ordered plaintiff admitted to the medical school based on the defendant's conceded inability to meet the burden imposed upon it by Franks v. Bowman, namely that even had the special admissions program not been in existence plaintiff would not have been admitted.

ISSUE: Is the special admission prgram unconstitutional and may race be a factor in fashioning admission programs?

DISCUSSION: The Supreme Court, in a split decision, held that the program in issue was unconstitutional and invalid but that schools were entitled to take race into account as a factor in their admission program.

Justice Powell writing for a majority of the Court opined that the special admissions program in issue was undeniably a classification based on race and ethnic background in that white applicants could not compete for all positions available. Noting that the guarantees of the 14th Amendment extended to "persons", the Court stated that "the guarantees of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Racial and ethnic classifications

are subject to stringent examination and exacting judicial examination regardless of whether the classification concerns a discrete or insular group, and the scope of the amendment extends to all persons including whites. When State policies touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear is precisely tailored to serve a "compelling governmental interest". In so doing it must be shown that its purpose is substantial and that use of the classification is necessary to accomplish its purpose. The Court conceded that the State has a legitimate substantial interest in eliminating the effects of identified discrimination but noted that goal was far more "focused" than the remedying of societal discrmination which the school set forth as a justification for its special program. "We have never approved a classification that aids persons perceived as members of a relatively victimized group at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings...it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." Regarding defendant's justification of its program for the purpose of improving health care service to communities currently underserviced the Court held that it had not carried its burden of demonstrating that it must prefer members of a particular group over all other individuals in order to promote better health care to these areas. Regarding defendant's suggestion that it was desirable to attain a diverse student body, Justice Powell opined that this goal was constitutionally permissible but that "ethnic diversity" is only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body. The Court noted, with approbation, Harvard's admission policy which took race into account but which did not insulate the individual from comparison with all other candidates and which, unlike defendant's program, treated each applicant as an individual. The Court found that inasmuch as the program in issue involved the use of an explicit racial classification and that defendant had not demonstrated that the challenged classification was necessary to promote a substantial state interest, the program was invalid.

Accordingly, the judgment of the California Supreme Court that the admission program was unconstitutional was affirmed, and the judgment that race could not be considered as part of an admissions program was reversed.

Justice Brennan, writing for four justices, would have found the defendant's admission policy constitutional in that both Title VI and the U.S. Constitution do not prohibit the remedial use of race to rectify societal discrimination and in that the school's articulated purpose is sufficienly important to justify the use of race-conscious admission procedures where there is a sound basis for concluding that minority underrepresentation is substantial and chronic and that the hardship of past discrmination is impeding access of minorities to the medical school.

Justice Stevens writing for four justices was of the opinion that the question of whether race could ever be a factor in an admission policy was not in issue.

Based on the settled practice of avoiding the consideration of constitutional issues if the case can be resolved on statutory grounds, these justices did not reach the issue of the constitutionality of the admission program. They found, however, that the plain language of Title VI prohibited the exclusion of an individual from a program based on race.

FURNCO CONSTRUCTION CORPORATION v. WATERS

438 U.S. 567 (1978)

FACTS: Three bricklayers brought suit under Title VII alleging racial discrimination under the disparate treatment theory enunciated in McDonnell Douglas v. Green and the disparate impact theory set forth in Griggs v. Duke Power Company. The District Court rendered judgment in favor of the defendant. The Court found that the defendant's explanation that the lack of experienced and highly qualified bricklayers could result in untimely work, substantial losses to the employer in addition to the possibility of costly maintenance work in the future, and the possibility of diminution of its reputation justified its refusal to engage in on the job training or hiring at the gate. The employer in this case did not maintain a permanent work force but instead hired a superintendent for each job and had him secure a competent work force. The supervisor in this case did not accept applicants as such but instead hired only persons whom he knew to be experienced and competent in this type of work.

Two of the black plaintiffs were not hired although it was conceded that they were fully qualified. The third black plaintiff who had worked for the supervisor previously was hired sometime after he had applied.

The Court of Appeals found that the plaintiffs had established a prima facie case of discrimination under McDonnell Douglas which had not been rebutted by the employer.

ISSUE: What is the exact scope of the prima facie case under McDonnell Douglas and the nature of the extent necessary to rest such a case?

DISCUSSION: The Supreme Court agreed that the proper approach in this case was that enunciated in McDonnell Douglas and that the plaintiffs made out a prima facie case under the four part test set forth in that decision. The Supreme Court suggested that the Court of Appeals went awry in equating the prima facie showing under McDonnell Douglas with an ultimate finding of discrimination. The Court opined that the Court of Appeals appended to the requirement imposed on the employer of showing that hiring procedures reasonably related to the achievement of a legitimate purpose a requirement that he use the method which allows him to consider the qualifications of the largest number of minority applicants. The Court noted that "a prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained are more likely than not based on the consideration of impermissible factors... and we are willing to presume this largely because we know from our experience that more often than not people do not act in totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race."

The Court also stated that once a prima facie case had been established under McDonnell Douglas, proof of a reasonably balanced work force was not wholly irrelevant to the issue of intent though could not conclusively rebut a showing of discriminatory motivation.

The Court ramanded the case to the District Court in order that it properly address the issue of whether the employer had rebutted plaintiff's prima facie case of discrimination

BOARD OF TRUSTEES v. SWEENEY
58 LEd. 2d 216 (1978)

FACTS: A state college professor filed suit under Title VII and the District Court entered judgment in her favor. The Court of Appeals affirmed stating that in order to rebut a prima facie showing of discrimination under McDonnell Douglas v. Green, the defendant was required to "prove absence of discriminatory motive."

ISSUE: Is it necessary for the employer to prove the absence of discriminatory motive to rebut a prima facie case of discrimination?

DISCUSSION: The Supreme Court in a 5-4 per curiam decision held that under McDonnell Douglas and Furnco the employer need only "articulate some legitimate, non-discriminatory reason" for his action and need not prove the absence of discriminatory motive. Inasmuch as the Court of Appeals imposed a heavier burden on the employer than was warranted, the court remanded for reconsideration in light of Furnco v. Waters.

The dissenting justices asserted that in both McDonnell Douglas and Furnco, the Court declared that when a prima facie case of discrimination was established, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration and not an illegitimate one such as race." The dissenters viewed the terms "articulated" and "proved" as interchangeable and asserted that when an employer showed that a legitimate, non-discriminatory reason accounted for his action, he simultaneously demonstrated that the action was not motivated by an illegitimate factor such as race.

FOLEY v. CONNELIE

435 U.S. 291 (1978)

FACTS: The plaintiffs, in a class action, charged that a State statute which limited the appointment of state troopers to applicants who are U.S. citizens violated the Equal Protection Clause of the 14th amendment. A three judge District Court held that the statute was constitutional.

ISSUE: Can a State constitutionally limit its State Troopers to citizens?

DISCUSSION: The Supreme Court held that citizenship may be a relevant qualification for fulfilling important nonelective positions held by officials who participate directly in the formulation, execution, or review of broad public policy. The Court held that a State need only show some rational relationship between the interest sought to be protected and the limiting classification. Inasmuch as police officers are clothed with authority to exercise an almost infinite variety of discretionary powers which can seriously affect individuals, citizenship bears a rational relationship to the demands of the particular position, and State may limit the performance of such responsibility to citizens.

LOS ANGELES DEPARTMENT OF WATER AND POWER v. MANHART
435 U.S. 702 (1978)

FACTS: The employer administered retirement, disability, and death benefits for its employees. The monthly retirement benefits for men and women of the same age, seniority and salary are equal. The employer determined that inasmuch as the average female employee will live a few years longer than the average male employee, the cost of a pension for the average retired female is greater than for the average male. Accordingly, the employer required female employees to make monthly contributions to the fund which were approximately 15% higher than those of male employees.

The plaintiffs, a class of female employees, filed suit in District Court praying for an injunction and restitution of excess contributions. The Court held that the contribution differential violated Title VII and ordered a refund of all excess contributions. The Court of Appeals affirmed.

ISSUE: Is an employer entitled to require its female employees to make larger contributions to its pension fund than its male employees because as a class, women live longer than men?

DISCUSSION: The Supreme Court found that Title VII makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions or principles of employment ...because of sex." The Court, noting that the statutory focus on the individual is unambiguous, stated that it precludes treatment of individuals as components of a sexual class. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. The Court held tha the lower courts erred in awarding retroactive relief. While noting that a presumption in favor of retroactive liability which the Court enunciated in Albemarle can seldom be overcome, the Court found that conscientious and intelligent administrators of pension funds may well have concluded that a program such as the one in the instant case was lawful and that the employer's failure to act more swiftly was a sign not of its recalcitrance, but of the problem's complexity. Inasmuch as the occurrence of major unforeseen contingencies may jeopardize the insurer's solvency and ultimately the insured's benefits, the rules that apply to such funds should not be applied retroactively unless the legislature has plainly commanded that result. Accordingly, the Court concluded that the granting of such relief in this case was erroneous.

U.S. Supreme Court
UNITED STEELWORKERS OF AMERICA v. WEBER
61 LED 2.d 480 (1979)

FACTS: Defendants United Steelworkers and Kaiser Aluminum entered into a collective bargaining agreement covering the terms and conditions of employment at 15 plants. The agreement contained inter alia, an affirmative action plan designed to eliminate racial imbalances in the work force. Black craft hiring goals were set for each plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled workers the skills necessary to become craft workers. The plan reserved for black employees 50 percent of the openings in these newly created in-plant training programs. Selection of craft trainees was made on the basis of seniority with the proviso that at least 50 percent of the new trainees were to be black until the percentage of black skilled craft workers in the plant in question (1.83 percent) approximated the percentage of blacks in the local labor force (39 percent). In operation, several black applicants selected for the program had less seniority than plaintiff.

Plaintiff filed suit under Title VII alleging racial discrimination. The District Court held that the plan violated Title VII and permanently enjoined defendants from denying whites access to on-the-job training based on their race. The Court of Appeals for the Fifth Circuit (2-1) affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII prohibitions against racial discrimination in employment.

ISSUE: Does Title VII forbid private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purposes provided in the defendants' plan?

DISCUSSION: The court noted plaintiff's reliance on a "literal" interpretation of sections 703(a) and (d) of the act in arguing that Congress intended to prohibit all race conscious affirmative action plans. Plaintiff argued that since McDonald v. Santa Fe settled that Title VII forbids discrimination against white employees solely because they were white, it follows that defendant's plan violates Title VII. While conceding that plaintiff's argument is "not without force," the court averred that it overlooks the significance of the fact that the Kaiser plan was voluntarily adopted by parties to eliminate traditional patterns of racial segregation.

Holding that it is "a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within the spirit nor within the intent of its makers," the court turned to the legislative history of the act. The court found that Congress' primary

concern in enacting the prohibition against racial discrimination in Title VII was with the plight of the Negro in our economy. The crux of the problem was to open employment opportunities for Negroes in occupations which have traditionally been closed to them. The court stressed a portion of the legislative history which emphasized the creation of "an atmosphere conducive to voluntary or local resolution of other forms of discrimination." The court found that the very statutory words intended as a spur or catalyst to cause employers and unions to self-examine and to self-evaluate employment practices and to endeavor to eliminate as far as possible the last vestiges of an unfortunate and ignominious page in this country's history, cannot be interpreted as an absolute prohibition against all private voluntary race conscious affirmative action efforts to hasten the elimination of such vestiges.

Looking to the statutory language itself, the court opined that had Congress meant to prohibit all race conscious affirmative action, it would have provided that Title VII does not require or permit racially preferential integration efforts. Instead, it merely prohibited requiring such efforts. The natural inference is that Congress chose not to forbid all voluntary race conscious affirmative action. Accordingly, the court held that Title VII's prohibition in 703(a) and (d) against racial discrimination does not condemn all private voluntary race conscious affirmative action plans. The court stressed that it was not defining in detail the line of demarcation between permissible and impermissible affirmative action plans. It is enough that the purpose of the plan mirrors those of this statute and does not unnecessarily trammel the interests of white employees, i.e., by requiring their discharge and replacement with black hires or by creating an absolute bar to the advancement of white employees. The court found it significant that the plan is only temporary in nature and is not intended to maintain racial balance, but rather to eliminate a manifest racial imbalance. The court concluded that defendants' plan "falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." The judgment of the Court of Appeals was reversed.

Justice Blackmun, in a concurring opinion, stated that he shared some of the misgivings expressed in Justice Rehnquist's dissent (see below) concerning the extent to which the legislative history clearly supports the result the court reached. However, he averred that additional considerations, practical and equitable, only partially perceived if at all by Congress in 1964, support the court's conclusion in this case. He stressed practical problems in implementing Title VII particularly, that employers might face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks. He suggested that according to plaintiff's reading of Title VII, even a whisper of emphasis on minority recruiting would be forbidden. He paid lip service to the theory under which those who had committed "arguable violations" of Title VII should be free to take reasonable steps without fear of liability to whites. The advantages of this

approach are that it responds to a practical problem not anticipated by Congress and it draws predictability from the outline of present law and clearly effectuates the purpose of the Act. Regarding the court's opinion permitting action wherever the job category is "traditionally segregated," he notes that the sources cited define "traditionally segregated" as involving a "societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category."

He found this broad approach disturbing in that the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination applicable to both whites and blacks. Justice Blackmun stated that the court's approach differed from the "arguable violation" theory in the following respects:

(1) It measures an individual employer's capacity for affirmative action solely in terms of a statistical disparity; the individual employer need not have engaged in discriminatory practices in the past. He concluded that in practice the difference in approach might not be that great. Further, to make the "arguable violation" standard work, it would have had to be set low enough to permit the employer to prove it without obligating himself to pay a damage award.

(2) The court's theory permits an employer to redress discrimination that lies wholly outside the bounds of Title VII, e.g., pre-act discrimination. Further, in assuming a prima facie case under Title VII, the composition of the employer's work force is compared to the composition of the pool of qualified workers. Under the court's standard concerning segregated job categories, that pool will reflect the effects of segregation and will permit a comparison with the composition of the work force as a whole.

He stressed the equity of permitting employers to ameliorate the effect of past discrimination for which Title VII provides no direct relief. He noted the temporary nature of the program in question and that Congress could alter Title VII if the court had misperceived the intent of the act.

Chief Justice Burger, dissenting, found the court's judgment to be contrary to the explicit language of the statute and arrived at by means wholly incompatible with long established principles of separation of powers. He stated that the court, under the guise of statutory construction, has effectively rewritten Title VII to achieve what it regards as a desirable result. It has amended the statute to do precisely what both its sponsors and its opponents agreed the statute was not intended to do. The plain language of the statute prohibits that which defendants have done. The statute was conceived and enacted to make discrimination against any individual illegal and voluntary compliance will not be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others.

Justice Rehnquist, in a dissenting opinion, stated that the court's decision represents a dramatic and unremarked switch in the court's interpretation of Title VII which he characterized as Orwellian. He asserted that the operative sections of Title VII prohibit all racial discrimination and prohibit such discrimination whether the covered individual is black or white. Citing Griggs, McDonald, and Furnco, he stated that the court has never wavered in its understanding that Title VII prohibits all racial discrimination. The court's newly discovered "legislative history" leads to a conclusion directly contrary to that compelled by the legislative history which the court had previously characterized as "uncontradicted." Because of the court's decision, an employer is free to discriminate on the basis of race and "trammel the interests of white employees" in favor of black employees in order to eliminate "racial imbalance." Specifically, he asserts that 703(a) (d) and (j) are consistent in their prohibition against granting preferential treatment based on race. Analyzing the legislative history in great detail, he concluded that 703(j), which states that the act is not to be interpreted "to require any employer...to grant preferential treatment to any individual or to any group..." based on race was specifically included in the act to counter the objection of congressmen that Title VII would permit racial balancing and preferential treatment. Not one congressman suggested during the 83 days of debate that Title VII would allow employers voluntarily to prefer racial minorities over white persons. Contrary to the court's interpretation, 703(j) is not directed to employers but to Federal agencies and courts who would ultimately interpret the act - this to allay the fears of some members of Congress that its intent to prohibit all racial preferences would be misconstrued. Justice Rehnquist noted that contrary to the majority's description of the plan in this case as "voluntary," Kaiser acted under pressure from the Office of Federal Contract Compliance in implementing its quota program. The court is thus, invoking the very provision of the act meant to bar such pressures to insulate them.

He stated that reading the language of Title VII against the background of its legislative history, one is led inescapably to the conclusion that Congress fully understood what it was saying and meant what it said. Section 703(j) did not mention voluntary discrimination per se because it is plainly prohibited by 703(a) and (d). He cites 703(i), granting immunity to certain types of preference for Indians to show that Congress could have and knows how to draft language suited to create racial preference.

Concluding, he said that there is perhaps no device more destructive to the notion of equality than the quota. "Whether described as 'benign discrimination' or 'affirmative action', the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII, Congress outlawed all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the court introduces into Title VII a tolerance for the very evil that the law was intended to eradicate without offering even a clue as to what the limits on that tolerance may be."

U.S. Supreme Court
NEW YORK CITY TRANSIT AUTHORITY v. BEAZER
59 L Ed 2d 587 (1979)

FACTS: The New York City Transit Authority (TA) refused to employ persons who use methadone. Plaintiffs filed suit challenging this practice. The District Court found that this policy violated the Equal Protection Clause of the 14th Amendment. The court found that the policy had no rational relationship to a State interest because substantial numbers of methadone users are capable of performing many of the jobs at the TA and issued injunctive relief with a proviso that the TA could exclude such employees from sensitive positions. In addition, the court found disparate impact against blacks and Hispanics in that 81 percent of TA employees referred for suspected violation of its drug rule were black or Hispanic and 62 to 65 percent of methadone maintained persons in New York are blacks or Hispanics. The court found that the policy was not business related and held that Title VII had been violated. (The court found no specific intent to discriminate against these minority groups.)

The Court of Appeals affirmed on constitutional grounds and did not address the statutory issue.

ISSUES: Do the statistics of record establish a prima facie case of discrimination? Does the TA's classification violate the Equal Protection Clause of the 14th Amendment?

DISCUSSION: Regarding the Title VII issue, the Supreme Court found that the statistics relied on did not establish a prima facie case of discrimination. That 81 percent of these employees suspected of drug use were black or Hispanic tells nothing about the racial composition of employees suspected of using methadone. Nor does the record disclose information about the number of persons dismissed for using methadone. Regarding the statistic that 62 to 65 percent of methadone users in the New York City area are blacks or Hispanics, the court found that this did not reveal how many of those sought work at the TA and revealed little about the class in question. The court opined that inasmuch as the statistics do not include participants in private programs, it tells nothing about overall disparity of users in the population. The court held that the weak statistical argument failed to prove a prima facie case of discrimination but that even were a prima facie case to be assumed, it was rebutted by the TA's demonstration that its narcotics rule is job related. Since the possibility of pretext was precluded by the District Court's finding of no racial animus or bias on the part of the TA, there was no basis for concluding that Title VII had been violated.

Turning to the constitutional issue, the court held that only when a governmental unit adopts a rule that has special impact on less than all persons does the question of Equal Protection arise. In this case, the court found that the restriction on drug use applied to all employees and applicants. Plaintiffs do not question the validity of a special

rule for users of narcotics; rather they feel that they should not be covered by that classification. Yet the record shows that there are differences between methadone users and those who use no narcotics of any kind. Nonetheless, in defending the District Court's ruling, plaintiffs concede that some special rules for methadone users were acceptable (i.e., one year in treatment). In other words, the District Court recognized that disparate treatment for methadone users was permissible yet required additional and more precise rules for this class. The Supreme Court found that TA's drug policy was supported by the legitimate inference that as long as a treatment program continues, a degree of uncertainty regarding performance exists. Therefore, the court concluded that it is a rational policy to accept employees after treatment rather than during treatment. The court found that even if this policy were unwise, that conclusion would concern matters of personnel policy and does not impinge on the Equal Protection clause. The court reversed the judgment of the Court of Appeals.

The dissenting justices stated that plaintiffs had made out a prima facie case by proving that about 63 percent of those using methadone in New York City are black or Hispanic and that only about 20 percent of the relevant population belongs to one of those groups. The dissenters would accept the statistical showing as establishing a prima facie case of disparate impact and would conclude that defendant did not show that its rule resulted in a higher quality labor force or any other job related purpose as required by Griggs.

Regarding the Equal Protection Clause, the dissenters opined that the issue is the rationality of placing successfully maintained or recently cured methadone users in the same category as those attempting to escape heroin addiction or who have failed to do so, rather than in the category of the general population. That 20 to 30 percent of methadone users are unsuccessful after one year on the program does not justify the blanket exclusion of the entire group.

U.S. Supreme Court
VANCE v. BRADLEY
59 L Ed 2d 171 (1979)

FACTS: Employees covered by the Foreign Service Act of 1946 face mandatory retirement at age 60. Those personnel covered by Civil Service retirement now face no mandatory retirement age. Plaintiff challenged his forced retirement on Equal Protection grounds and a three judge District Court rendered judgment in his favor.

ISSUE: Did Congress violate the Equal Protection Clause by requiring retirement at age 60 of Federal employees covered by Foreign Service retirement and disability systems but not those covered by the Civil Service retirement and disability system?

DISCUSSION: The Supreme Court noted that the District Court and all parties agreed that the issue should be adjudicated under the standards set forth in Massachusetts Board of Retirement v. Murgia and thus, that the provision should be held valid if it is rationally related to furthering a legitimate State interest. The defendant argued that one of its legitimate goals is to recruit, train and ensure the professional competence as well as the mental and physical reliability of the corps of public servants who hold positions under difficult and dangerous conditions. Defendant claimed that compulsory retirement furthers this objective by creating predictable promotion opportunities, thus spurring morale and stimulating superior performance. In addition, the rule removes from the service those who are sufficiently old that they may be less equipped or ready than younger people to face the rigors of overseas duty. The Court opined that the District Court erred in characterizing the purpose of the act as "recruiting and promoting younger people solely because of their youth...", an action which is"...inherently discriminatory and cannot provide a legitimate basis for the statutory rule." The Court found that Congress was intent not on recruiting youth qua youth but on stimulating the highest performance by assuring the opportunities for promotion would be available despite limitations on the number of positions in the service. "Aiming at superior achievement can hardly be characterized as illegitimate..." The court found that Congress could reasonably have set higher standards for the Foreign Service than the Civil Service and overturned the District Court's refusal to accept this exercise of Congressional judgment as valid. The court also credited defendant's contention that Foreign Service duty was difficult and often hazardous and that Congress had rational grounds for setting a retirement age to insure the vitality of its employees and their successful performance under such circumstances. Although the court conceded that the classification was to some extent under and overinclusive, it held that perfection is by no means required. Although individual Foreign Service employees may be able to perform past age 60, this does not invalidate the provision of the act, if as the District Court was willing to assume, age brings increasing susceptibility to physical difficulties. The court

held that the plaintiff had failed to convincingly demonstrate that the legislative facts on which the classification was based could not reasonably be conceived to be true by the governmental decisionmaker. Accordingly, the judgment of the District Court was reversed.

Justice Marshall, in a dissent, would require proof that the Foreign Service mandatory retirement provision serves important governmental objectives and is substantially related to achievement of these objectives. Finding that plaintiffs have successfully challenged the government's central premise that the press of foreign service duties diminishes the competence of older employees to perform their jobs he would have affirmed the District Court's judgment.

U.S. Supreme Court
AMBACH v. NORWICK
60 L Ed 2d 49 (1979)

FACTS: The New York State Education Law forbids certification as a public school teacher of any person who is not a citizen of the United States unless that person has manifested an intention to apply for citizenship. Plaintiffs met all educational requirements set for certification as a teacher but consistently refused to seek citizenship although they are eligible. Their applications for teaching certificates were denied and plaintiffs filed suit to enjoin enforcement of the provisions of the law.

A three judge District Court held that the provision discriminated against aliens in violation of the Equal Protection Clause of the 14th Amendment. Specifically, the Court held that the statute was overbroad in that it excluded all resident aliens from all teaching jobs regardless of the subject to be taught, the alien's nationality, the nature of his relationship to this country, and his willingness to substitute some other sign of loyalty to this nation's political values.

ISSUE: May a State, consistent with the Equal Protection Clause, refuse to employ as elementary and secondary school teacher aliens who are eligible for citizenship but who refuse to seek naturalization?

DISCUSSION: The Supreme Court (5-4) noted that it has struck down statutory classifications which have unconstitutionally infringed on an alien's right to work for a living in the common occupations of the community. At the same time, the Court has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment. The court found that over the years, it has not abandoned the general principle that some State functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become a part of the process of self government. Where positions involving participation in the formulation, execution, or review of broad public policy functions are involved, the exclusion of aliens would not involve as demanding scrutiny from the courts as other positions. In Foley v. Connelie, the court applied the rational basis standard to uphold the exclusion of aliens from the ranks of a police force. The rule for governmental functions, which is an exception to the general standard, rests on the notion that the distinction between citizens and aliens which is ordinarily irrelevant to private activity is fundamental to the definition and government of a State. Public education, like the police function, fulfills a most fundamental obligation of government to its constituency and the importance of public schools in the preparation of individuals as citizens has long been recognized. Education is perhaps the most important function of State and local governments. All public school teachers and not just those responsible for teaching courses directly related to government history and civic duties should help fulfill the function of influencing student attitudes toward government.

The court held that public school teachers come well within the governmental function principle recognized by the court. Therefore, the Constitution requires only that a citizenship requirement applicable to teaching in public schools bear a rational relationship to a legitimate State interest. The legitimate interest here is that the restriction imposed applies only to those who have demonstrated unwillingness to obtain citizenship. The provision of the law bears a rational relationship to this interest. Accordingly, the judgment of the District Court panel is reversed.

The dissenting justices, citing Foley v. Connelie, found that the key issue is whether the employee participated directly in the formulation, execution, or review of broad public policy. The New York law in question sweeps indiscriminately and is not narrowly confined nor precise in its application. Further, it is irrational in that a citizen less qualified and less familiar with the subject matter can be hired but a well-qualified noncitizen cannot. The dissenters found it difficult to understand how the court could differentiate this holding and its previous holding permitting resident aliens to become lawyers. The dissenters would have affirmed the ruling of the District Court.

U.S. Supreme Court
OSCAR MAYER & COMPANY v. EVANS
60 LEd 2d 609 (1979)

FACTS: Plaintiff, who was involuntarily retired, filed notice of intent with the U.S. Department of Labor to file suit under the Age Discrimination in Employment Act (ADEA). Plaintiff asked the Department whether he was required to file a complaint with the appropriate State agency before commencing suit in Federal court and received a negative reply. Plaintiff, in fact, filed suit in District Court and the defendant moved to dismiss his complaint on the grounds that he did not raise his complaint at the State level. The District Court denied the motion to dismiss and the Court of Appeals affirmed.

ISSUES: (1) Must a plaintiff bring his complaint of age discrimination before the appropriate State agency before filing suit in Federal court? (2) If so, must the State proceedings be commenced within the time limits set forth in the State regulations?

DISCUSSION: The Supreme Court, noting that the question of statutory construction in this instance was close, held that a plaintiff was required to resort to State administrative proceedings before filing suit in Federal court. The court reasoned that section 14(b) of the ADEA was patterned after and was virtually in haec verba with section 706(b) of Title VII. The court found that Congress had intended to screen from Federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in a voluntary and localized manner and, therefore, intended to give the State a limited opportunity to resolve problems of employment discrimination. Because State agencies cannot even attempt to resolve discrimination complaints not brought to their attention, section 706 has been interpreted to require resort to appropriate State proceedings, where they exist, before bringing suit under Title VII. The court found that the ADEA and Title VII have a common purpose and because of the similarity of language and inasmuch as the legislative history indicates that the source of 14(b) and the ADEA was 706 of Title VII, the court concluded that prior resort to State proceedings is required.

The plaintiff claimed that since his failure to file an administrative complaint was due to incorrect information by the Department of Labor, his tardiness should be excused. The defendant argued that the State statute of limitation for filing an administrative complaint had run and, therefore, Federal jurisdiction is barred. The court found that both arguments missed the mark. Section 14(b) requires only that grievant commence State proceedings. Nothing required him to commence them within the time period allowed by the State in order to preserve a right of action in Federal court under the ADEA. After such a State proceeding is commenced, whether timely or not, Federal litigation may be brought after 60 days. (This is also the prevailing interpretation of Title VII by the courts and EEOC.) The court found that this construction is fully

consistent with the ADEA's remedial purposes and is particularly appropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

The court reversed the judgment of the Court of Appeals and remanded with instructions that the District Court hold the case in abeyence until the plaintiff complies with section 14(b).

Four justices would have dismissed the complaint because plaintiff had never resorted to State remedies as is required by the ADEA. They would not issue what they characterized as an advisory opinion on the second issue.

U.S. Supreme Court
DAVIS v. PASSMAN
60 L.Ed. 2d. 846 (1979)

FACTS: Defendant, a Congressman, terminated plaintiff, his deputy administrative assistant, in a letter which stated in pertinent part that although plaintiff was an "able, energetic and very hard worker" he had concluded "that it was essential that the understudy to my Administrative Assistant be a man."

Plaintiff filed suit in District Court alleging that defendant's conduct discriminated against her on the basis of sex in violation of the 5th Amendment. She sought damages in the form of backpay. Defendant's motion to dismiss for failure to state a claim because the law afforded no private right of action for her allegation was granted. A panel of the Court of Appeals (5th Circuit) reversed but the Court of Appeals sitting en banc, reversed the decision of the panel and ruled for the defendant.

ISSUE: Can a cause of action and a damages remedy be implied directly under the Constitution when the Due Process Clause of the 5th Amendment is violated?

DISCUSSION: The Supreme Court reaffirmed its earlier holdings that the Due Process Clause of the 5th Amendment forbids the Federal government from denying equal protection of the law. To withstand scrutiny under the Equal Protection component of the Due Process Clause, classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. The Equal Protection component of the Due Process Clause thus confers on plaintiff a Federal constitutional right to be free from gender discrimination which cannot meet these requirements.

The court next addressed the question of whether plaintiff has a cause of action to assert this right. While Congress, in creating statutory rights, may determine who may enforce them and thus, who has a cause of action, the Constitution does not "partake of the prolixities of a legal code...(i)t speaks instead with a majestic simplicity." One of its important objectives is the designation of rights, and the judiciary is clearly discernable as the primary means through which these rights may be enforced. In the absence of a textually demonstrable constitutional commitment of an issue to a coordinate political department, the court will presume that justifiable constitutional rights are to be enforced in the courts. The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. The court concluded that plaintiff is an appropriate party to invoke the general Federal question jurisdiction of the District Court to seek relief and that she, therefore, has a cause of action under the 5th Amendment.

The court next addressed the question of whether a damage remedy is an appropriate form of relief in this type of case. The court found that historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty and that it would be judicially manageable here because this case presents an issue without difficult questions of valuation or causation. Further, litigation under Title VII has given Federal courts great experience in evaluating claims for back-pay due to illegal sex discrimination. Also, since defendant has retired, equitable relief in the form of reinstatement would be unavailing. The court held that the Title VII provision excluding Congress from liability for discrimination leaves undisturbed whatever remedies plaintiff might otherwise possess.

The court reversed the decision of the Court of Appeals sitting en banc and remanded for consideration of whether defendant's conduct was shielded by the Speech and Debate Clause of the Constitution.

Three justices dissented stating that "A Member of Congress has a right to expect that every person on his or her staff will give total loyalty to the political position of the Member. This may, on occasion, lead a Member to employ a particular person on a racial, ethnic, religious, or gender basis, thought to be acceptable to the constituency represented, even though in the other branches of government or in the private sector such selection factors might be prohibited." Separation of powers dictates that until Congress legislates otherwise as to employment standards for its own staffs, judicial power in this area is circumscribed. The intimation that if defendant were still a member of Congress, a Federal court could command him on pain of contempt to re-employ plaintiff represents an astonishing breach with the concept of separate, coequal branches. These justices would have affirmed.

One justice, joined by one of the above-mentioned dissenting justices, would have remanded to the Court of Appeals with directions to decide the Speech and Debate Clause issue and would not have reached the issue concerning a private cause of action under the Fifth Amendment.

U.S. Supreme Court
PERSONNEL ADMINISTRATOR v. FEENEY
60 L.Ed. 2d. 870 (1979)

FACTS: Plaintiff challenged as violative of the Equal Protection Clause of the 14th Amendment the Massachusetts Veterans Preference Statute under which all veterans who qualify for State civil service positions must be considered for appointment ahead of any qualified nonveterans. Plaintiff alleged that the absolute preference formula inevitably operates to exclude women from consideration.

A three-judge District Court panel (2-1) found that the absolute preference afforded by the Act had a devastating impact on the employment opportunities of women. Although it found that the goals of the preference were worthy and legitimate, and that the legislation had not been enacted for the purpose of discrimination against women, the court reasoned that its exclusionary impact on women was so severe as to require the state to further its goals through more limited forms of preference. On appeal, the Supreme Court remanded for further consideration in light of Washington v. Davis and the District Court reaffirmed its original judgment.

ISSUE: Does a statute which grants an absolute lifetime preference to veterans discriminate against women in violation of the Equal Protection Clause of the 14th Amendment?

DISCUSSION: The Supreme Court found that veterans' hiring preference has traditionally been justified as a measure designed to reward veterans for the sacrifices that they made to the nation, to ease the transition from military to civilian life, to encourage patriotic service and to attract loyal and disciplined people to civil service occupations. The court noted that the Act defines the term "veterans" in gender-neutral language. Woman veterans have always been entitled to the preference and the benefits of the statute have always been extended to women who served in unofficial auxilliary units.

The court stated that the Equal Protection Clause of the 14th Amendment does not take from the States all powers of classification. The calculus of effects; the manner in which a particular law reverberates in a society is a legislative and not a judicial function. Certain classifications, however, in themselves provide reason to infer antipathy. Classifications based on gender have traditionally been the touchstone for pervasive and often subtle discrimination. Such classifications must bear a close and substantial relationship to important governmental objectives. Although public employment is not a constitutional right, any State law overtly or covertly designed to prefer males over females in public employment would require "an exceedingly persuasive justification" to withstand a constitutional challenge under the Equal Protection Clause.

When a statute which is gender-neutral on its face is challenged on the grounds that its effect upon women is disproportionately adverse, a two fold inquiry is appropriate; (1) whether the statutory classification is indeed neutral on its face in the sense that it is not gender based; and (2) if the classification is not based on gender, whether the adverse effect reflects invidious gender-based discrimination. Although impact provides an important starting point, purposeful discrimination is the condition which offends the Constitution (Washington v. Davis). Plaintiff conceded that state hiring preferences for veterans are not per se invalid and the District Court found that the preference was not a pretext for gender based discrimination.

The court found that the impact of the statute did not signal a lack of neutrality in that women veterans were always included and significant numbers of nonveterans were men who were also placed at a disadvantage. Too, many men are affected by the Act to permit the inference that the statute is but a pretext for excluding women. Further, the court found that the legitimate, non-invidious purposes of this type of law are clear.

Plaintiff contended that the statute runs afoul of the Constitution in that a person (or legislature) is presumed to intend the natural and foreseeable consequences of his voluntary act. The results of the statute in harming women inevitably follow from the statutory scheme. The court responded that discriminatory purpose implies more than intent as violation or intent as awareness of consequences. It implies that the decision-maker selected a particular course of action because of its adverse effects upon an identifiable group. Here, there is a preference for veterans of either sex; not men over women.

The court reversed the judgment of the District Court.

Two justices dissented, finding that a legislative action to advantage one group does not exclude the possibility that it also intends to disadvantage others. The critical inquiry is whether an illicit consideration had an appreciable role in shaping the enactment. Since reliable evidence of subjective intent is seldom obtainable, resort to inference based on objective factors is generally unavoidable. Adverse impact on women in this case is indisputable. Accordingly, the burden should rest on the State to prove that sex-based considerations played no part in the legislative scheme. Here that burden was not sustained.

The dissenters noted that until 1971, the State exempted from operation of the preference any job "especially calling for women" and that this created a gender-based civil service hierarchy with women at the lower rungs. This scheme reflects a perpetuation of the archaic presumption about women's roles which the court has held to be invalid. The dissenters would find that the mere recitation of a benign purpose cannot in and of itself, insulate legislative classifications from constitutional scrutiny and that in this case, the State has failed to establish sufficient relationships between its objectives and the manner chosen to effectuate them.

U.S. Supreme Court
GIVHAN v. WESTERN LINE CONSOLIDATED SCHOOL DISTRICT
58 L.Ed 2d 619 (1979)

FACTS: Plaintiff was dismissed from her teaching position. At the time of her termination the defendant was the subject of a desegregation order entered by a U.S. District Court.

Plaintiff intervened in that action seeking reinstatement on the grounds that her dismissal infringed on her right of free speech secured by the 1st and 14th Amendments to the U.S. Constitution. (Plaintiff had had a series of private encounters with the school principal in which she had questioned employment practices which she thought were discriminatory.)

The District Court held that the primary reason for the school district's failure to renew plaintiff's contract was her criticism of the policies of the school district and ordered her reinstated.

The Court of Appeals for the Fifth Circuit reversed on the grounds that the 1st Amendment did not protect opinions which were expressed in private to the school principal. The court found that there is no constitutional right to "press even 'good' ideas on an unwilling recipient."

ISSUE: Is private conversation with an employer protected speech under the 1st amendment?

DISCUSSION: The Supreme Court, noting that the first amendment forbids the abridgment of freedom of speech, held that neither the amendment itself nor previous court decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than publicly. The court rejected the notion that the principal was an "unwilling recipient" of plaintiff's complaints noting that he had invited her into his office. The court reaffirmed its holding in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1976), that the fact that conduct protected by the 1st and 14th Amendments played a "substantial" part in a decision not to rehire does not amount to a constitutional violation justifying remedial action. The court held that the proper test is to permit the defendant to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the constitutionally prohibited conduct. Inasmuch as the District Court found only that the plaintiff's criticism was the primary reason for her dismissal, the court remanded for a determination of whether plaintiff would have been dismissed but for the illegal conduct.

U.S. Supreme Court
GREAT AMERICAN FEDERAL SAVINGS & LOAN v. NOVOTNY
60 L.Ed 2d 957 (1979)

FACTS: Plaintiff, Secretary of a Savings and Loan Association and a member of its Board of Directors, alleged that the association intentionally and deliberately embarked upon and pursued a course of conduct the effect of which was to deny female employees equal employment opportunities. Plaintiff further alleged that when he expressed support for female employees at a board meeting, his connection with the association was abruptly ended (he was not re-elected as Secretary, he was not re-elected to the board, he was fired).

Plaintiff filed a complaint with EEOC under Title VII. After receiving a right to sue letter, he brought suit under Title VII and in addition, claiming damages under 42 USC 1985(c), contending that he had been injured as the result of a conspiracy to deprive him of equal protection and equal privileges and immunity under the law.

The District Court granted defendent's motion to dismiss. The Court of Appeals for the Third Circuit sitting en banc, reversed holding that conspiracies motivated by an invidious animus against women fall within 1985(c) and that Title VII could be the source of a right asserted in an action under 1985(c).

ISSUE: Is a person injured by a conspiracy to violate section 704(a) of Title VII deprived of the equal protection of the laws or equal privileges and immunity under the laws within the meaning of 1985(c).

DISCUSSION: The Supreme Court (6-3) held that section 1985(c) provides no substantive rights itself, but merely provides a remedy for violations of the right it designates. The court held that in passing Title VII, Congress set forth a comprehensive plan providing for administrative procedures, time limits, and remedies, specifically, injunctive relief and back pay. The majority of the Federal courts have held that the act does not allow a court to award general or punitive damages. If a violation of Title VII could be asserted through 1985(c), a complainant could avoid most if not all of those detailed and specific provisions of the law, i.e., could seek compensatory and perhaps punitive damages, could demand a jury trial, and could completely bypass the administrative process which plays such a crucial role in the scheme established in Title VII.

The court held that 1985(c) may not be invoked to redress a violation of Title VII and vacated the judgment of the Court of Appeals.

Court of Appeals - 1st Circuit
CASTRO v. BEECHER

459 F. 2d 725 (1972)

FACTS: Plaintiffs instituted this class action under 42 U.S.C. 1981, 1983, on behalf of black and Spanish-surnamed persons for alleged discrimination in hiring and recruiting police officers in Massachusetts. Plaintiffs sought injunctive and declaratory relief. The District Court found that recruitment had been adequately and fairly conducted and that the educational, height and swim test requirements all had a significant relationship to job performance. It found, however, that the written examination lacked significant job-relatedness and that it discriminated against minorities which did not share the prevailing white culture. The court, therefore, enjoined defendant from using the eligible lists resulting from the discriminatory examinations, set guidelines for preparing a new exam and directed defendant to submit a plan for recruiting more black and Spanish-surnamed candidates. Since the court refused to certify a class action, it declined to order preferential hiring.

ISSUES: Are defendant's selection procedures job-related and is a preferential hiring remedy appropriate in this case?

DISCUSSION: The Court of Appeals affirmed the lower court's findings on recruitment and the height, swim test and high school equivalency requirements (Plaintiff failed to show a prima facie case of disproportionate impact for these requirements). The court reversed, however, regarding the failure to certify a class, but limited the class to black and Spanish-surnamed persons who took and failed the examination from 1968 to 1970. Since passing rates on the test (25% blacks; 10% Spanish-surnamed; 65% others) show a prima facie case and since defendant did not sufficiently validate it, the court agreed that a new test should be developed. But rather than disadvantage those persons who passed the earlier exam, it held that the eligible lists remain valid. Furthermore, holding that "if relief in the near future is to be more than token," further remedy is needed. The court ordered the establishment of priority pools of eligibles to be used according to a ratio in order to increase minority employment.

Court of Appeals - 1st Circuit
HOCHSTADT v. WORCESTER FOUNDATION
545 F. 2d. 222 (1976)

FACTS: Plaintiff filed suit against defendant Scientific Foundation for injunctive relief under Title VII pending disposition by EEOC of her prior EEO complaint to prevent defendant from terminating her. Plaintiff claimed that her discharge was in retaliation for her opposition to defendant's unlawful employment practices, opposition which is protected by section 704(a) of Title VII.

The record showed that plaintiff initially filed a charge of discrimination against defendant because it allegedly set her starting salary much lower than that of male employees. Subsequently, plaintiff filed a complaint with HEW which caused the latter to request defendant to implement an affirmative action plan. Plaintiff eventually entered into a monetary settlement with defendant on her first complaint. During the pendancy of those charges, plaintiff sought to elicit salary information from the other scientists, which on several occasions interfered with their work. Plaintiff was also found to have circulated rumors that defendant would lose much of its Federal funding because it was not complying with regulations concerning affirmative action programs. On three occasions defendant was compelled to invite officials from HEW to assure its scientists that they were not in danger of losing funding. Plaintiff also invited a reporter to examine information concerning the salary structure of the Foundation who wrote several articles based upon this information. After several heated disputes with management occurred, the Foundation discharged plaintiff because of her "continuing lack of cooperation, disruptive influence, hostility, and threats towards the Institution.

The District Court denied the application for injunctive relief concluding that plaintiff had failed to prove the likelihood of success on the merits of her claim of discrimination.

ISSUE: Was plaintiff's action protected by section 704(a) of Title VII?

DISCUSSION: The Court of Appeals noted that plaintiff was not fired for incompetence and "when an employee is discharged for aggressive and allegedly disruptive activities associated with her complaints of discrimination, it is plainly a delicate matter to separate out the protected from the nonprotected conduct." The court credited the District Court's findings that plaintiff went too far in the scope and style of her protests over a low performance evaluation and that her conduct regarding the earlier salary dispute was excessively disruptive and hostile and could at a later date, notwithstanding the settlement, be taken into account in determining plaintiff's suitability for continued employment. The court held that although section 704 (a) protects opposition to an unlawful employment practice, and that an employee may not be fired for registering good faith complaints of discrimination, an employer is entitled to loyalty and cooperation from employees. The

Court must balance the employee's right to reasonably oppose acts of sex discrimination and Congress' manifest desire not to tie the hands of employers in the objective selection and control of personnel.

Allowing an employee to invoke the protection of 704 (a) for conduct aimed at achieving purely ulterior motives or for conduct aimed at achieving proper objectives through improper means could discourage employers from hiring persons whom the act is designed to protect.

The court found that 704(a) does not afford an employee unlimited license to complain at any and all times and places. In this case, plaintiff was guilty of damaging acts of disloyalty (such as asserting that the Foundation would lose its government funds.) Although plaintiff's actions were associated with a protected objective, the District Court reasonably concluded that her actions were excessive and damaging. The decision of the District Court was accordingly affirmed.

Court of Appeals - 1st Circuit

KING v. NEW HAMPSHIRE DEPT. OF RESOURCES AND ECONOMIC DEVELOPMENT

562 F. 2d. 80 (1977)

FACTS: The plaintiff applied for a summer position and was refused employment. After exhausting her administrative remedies, she filed suit alleging sex discrimination.

The District Court found that 1) there were vacancies when plaintiff applied, 2) that plaintiff was qualified to fill these positions, and that 3) the hiring official displayed "discriminatory animus" toward her at an interview by asking whether she could wield a sledgehammer and whether she has any construction industry experience, neither of which related to the position in question. Finding that the defendant's reliance on an adverse job reference was pretextual, the Court held that discrimination had occurred and ordered relief.

ISSUE: Was a prima facie case under McDonnell Douglas v. Green established?

DISCUSSION: In McDonnell Douglas v. Green the Supreme Court propounded a four part test for establishing a prima facie case in discrimination cases: 1) that plaintiff was a member of a minority group 2) that she applied for and was qualified for a vacant position, 3) that she was rejected and 4) that the employer continued to seek applicants with plaintiff's qualifications. The defendant argued before the Court of Appeals that the District Court erred in holding inapplicable the fourth prong of the above-cited test. The Court noted that in McDonnell Douglas the Supreme Court made clear that the listed specifications for proving a prima facie case would not necessarily apply in different factual situations. Here the hiring process was not seriatum in nature; rather applicants were chosen from a pool. Moreover, the employer's discriminatory intent was proved largely by his own words and actions. The Court upheld the District Court's view that a prima facie case was established shifting the burden to the defendant to show a legitimate, non-discriminatory reason for the rejection of plaintiff's application. The District Court's judgment that the single negative job reference was not the real reason for refusing to hire plaintiff and was thus a pretext for discrimination was upheld as not clearly erroneous. The decision of the District Court was therefore, affirmed.

Court of Appeals - 1st Circuit
FISHER v. FLYNN
598 F.2d 663 (1979)

FACTS: Plaintiff, an assistant professor at a university, alleged sex discrimination under Title VII and 42 USC 1983 in the termination of her employment. Specifically, she alleged that "the...termination was caused solely by discriminatory matters..." and that "some part of the above-mentioned discriminatory matters was the refusal by the plaintiff to accede to the romantic advances of (the department chairman)."

The District Court dismissed the complaint because the plaintiff failed to allege facts sufficient to state a claim upon which relief may be granted.

ISSUE: Did the plaintiff state an adequate claim of discrimination under Title VII and 42 USC 1983?

DISCUSSION: The Court of Appeals held that complaints based on civil rights statutes must be more than statements of simple conclusions. They must at least outline the facts constituting the alleged violation. Only that part of the complaint dealing with conditioning of employment on acquiescence to romantic advances identifies specific conduct allegedly in violation of 1983 or Title VII. Were the court to agree that such conduct was illegal (an issue which was not reached) it would still conclude that plaintiff had set forth insufficient facts to indicate that employment was, in fact, conditioned on acquiescence to romantic advances. The plaintiff has not alleged a sufficient nexus between her refusal to accede to the alleged overtures and her termination. Specifically, she has not alleged that the Chairman had the authority to terminate her or effectively recommend termination. In the circumstances of this case, plaintiff could not show that "but for" the illegal conduct, she would not have been terminated as is required by the Supreme Court in Givhan. Plaintiff's complaint merely indicated that her rebuff of alleged advances constituted "some part" of the reason for her termination. For all that appears, the romantic overtures were but an unsatisfactory personal encounter with no employment repercussions and were consequently, not actionable. The judgment of the District Court was affirmed.

Court of Appeals -2nd Circuit
CHANCE v. BOARD OF EXAMINERS

458 F. 2d 1167 (1972)

FACTS: Plaintiff instituted this class action under 42 U.S.C. 1981, 1983 on their behalf and on behalf of those similarly situated to enjoin the N.Y. Board of Education from conducting certain examinations in order to qualify for supervisory positions with the Board. Plaintiffs held licenses issued by the State which qualified them for supervisory positions but failed the qualifying examination offered by the city. Plaintiffs contend that the examinations are discriminatory toward blacks and Spanish-speaking people and that the test, which covers broad areas of general knowledge, bears no relationship to determination of qualifications of persons seeking supervisory positions. Plaintiff's statistics indicate that white candidates passed the various supervisory examination, considered together, at almost one and one-half times the rate of black and Puerto Rican candidates. Defendants contend that plaintiffs must show that the tests are not related to the position and without such showing are not entitled to relief.

ISSUES: (1) Did plaintiff's statistics constitute a prima facie case of discrimination? (2) Are defendant's written examinations job-related?

DISCUSSION: Besides using plaintiff's statistics, the Court of Appeals also relied on other statistics which showed that cities not using New York's system of examinations had a much higher percentage of blacks and Puerto Ricans in supervisory positions. While these statistics are not conclusive that defendant was guilty of discrimination, the court held that plaintiff has made a prima facie case of discrimination, because such a conclusion is clearly not illogical.

The Court also concluded that the defendant did not meet its heavy burden of justifying the written examinations as job-related. This burden could have been satisfied either by content or predictive validation, although the court noted that predictive validation under 42 U.S.C. 1981, 1983 is preferred. Defendant failed at both methods. The written examinations placed more emphasis on measuring a candidate's ability to memorize than on his ability to perform as a supervisor.

Court of Appeals - 2nd Circuit

BRIDGEPORT GUARDIANS, INC. v. BRIDGEPORT CIVIL SERVICE COMMISSION

482 F.2d 1333 (1973)

FACTS: Plaintiff brought this action under 42 U.S.C. 1981, 1983, charging that the merit system examination for initial appointments and promotion to positions in the city police department discriminated against black and Spanish residents. Only 3.6 percent of the police force are minorities compared to 25 percent of the Bridgeport general population. Between 1965 and 1970, 58 percent of the white candidates passed the examination while only 17 percent of the black and Puerto Rican applicants were successful. Statistics for the promotional examination were more limited, as only 20 non-whites had taken the exam since 1960. The court concluded, therefore, that plaintiffs failed to set forth a prima facie case of discrimination with regard to the promotion examination and did not discuss the job-relatedness of that test.

ISSUES: (1) What is the standard of job-relatedness for an action arising under 42 U.S.C. 1983? (2) Are hiring quotas appropriate in this case?

DISCUSSION: The Court of Appeals held that under 42 U.S.C. 1981, 1983, the defendant must establish, after plaintiff has proved his prima facie case of discrimination, that the test bears a demonstrable relationship to successful performance of the jobs for which it was used, which is the same standard employed in Griggs, a Title VII suit. The written examination in question is a general intelligence test and the court concluded that the defendant failed to establish its job-relatedness by an acceptable method of validation. The court enjoined the use of the test and set up a hiring quota for minorities of 15 percent of the police force, basing its decree on the objective of eradicating the effects of past discrimination. It refused, however, to grant a quota for promotions above the rank of patrolman since the imposition of this type of quota could have an adverse effect on the morale of white patrolmen.

Court of Appeals - 2nd Circuit

KIRKLAND v. NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES

520 F.2d 420 (1975)

FACTS: Plaintiffs brought this class action under 42 U.S.C. 1981, 1983, on behalf of themselves and other similarly situated correction officers who were seeking promotion to the position of correction sergeant. Promotions were based on a written examination which plaintiffs contend has a disproportionate impact on minorities. Their statistics showed the following differences in passing rates on the exam: 30.8 percent for whites; 7.7 percent for blacks; and 12.5 percent for Hispanics. The District Court enjoined the use of the test and ordered that defendant promote at least one black or Hispanic employee for each three white employees promoted until the combined percentages of black and Hispanic sergeants were equal to the corresponding percentage of black and Hispanic correction officers.

ISSUES: Is the written examination job-related? Where are judicially imposed racial quotas appropriate?

DISCUSSION: The Court of Appeals found that plaintiff's statistics sufficiently presented a prima facie case of discriminatory effect caused by the written examination and that defendant failed to carry its heavy burden of establishing the job-relatedness of the examination. Furthermore, in this 1983 action, the court followed the Albemarle Paper Co. v. Moody decision, a Title VII case involving a private industrial employer in endorsing procedures for validation outlined in the EEOC Guidelines.

The court reversed in part the Distict Court's order to impose a racial quota because of the limited proof of past discrimination and the limited scope of the issues. This case involves only one test and 117 individuals who failed. The court noted that racial quotas have been imposed only in extraordinary circumstances and usually in cases where the hiring involves "the public at large, none of whose members can be identified individually in advance." The court affirmed that part of the decree that imposes ratio hiring if the defendant chooses to make promotions before a new test is validated. But once a civil service test is shown to be job-related, preferences with regard to race should be terminated.

COURT OF APPEALS -2nd CIRCUIT
USERY v. COLUMBIA UNIVERSITY

568 F. 2d. 953 (1977)

FACTS: Defendant maintained separate classifications for the positions of light cleaner and heavy cleaner. There were 160 heavy cleaners of whom 4 were women and 111 light cleaners, all of whom were women. (All positions were open to members of both sexes). Light cleaners dusted, mopped, vacuumed, polished and emptied wastebaskets. Heavy cleaners mopped well-travelled corridors, collected the trash bins which the light cleaners filled, and cleaned toilets. Some performed loading and unloading duties, climbed ladders and shoveled snow. Heavy cleaners were paid an additional 45¢ an hour.

The Secretary of Labor filed suit alleging a violation of the Equal Pay Act and requested an injunction and back pay. The Act prohibits an employer from discriminating "between employees on the basis of sex by paying wages to employees... at a rate less than the rate at which he pays wages to employees of the opposite sex... for equal work on jobs the performance of which requires equal skill, effort, and responsibility which are performed under similar working conditions."

The District Court found that the positions of heavy cleaner involved greater effort than that of light cleaner and dismissed the suit.

ISSUE: Was the work performed by the heavy and light cleaners "equal" within the meaning of the Equal Pay Act?

DISCUSSION: The Court of Appeals stated that the burden of proving equal work was on the Secretary of Labor although he does not have to prove that the jobs are identical. Substantial equality is the test. "Effort" is defined by rule as the physical or mental exertion required in performing a job." So long as the ultimate degree of exertion remains comparable, the mere fact that some jobs call for effort different in kind will not render them unequal.

The Secretary of Labor contended that 1) although different tasks were involved there were equivalent amounts of effort expended (i.e. the light cleaners used less heavy equipment but covered a wider area) and 2) the heavy equipment was on wheels and was easily moved.

The Court found that the tasks assigned to the heavy cleaners involved a higher concentration of dirt and required a greater cleaning effort and that the defendant's reliance on use of heavy equipment was significant in that it is bulkier and heavier. The Court ruled that the Act has no factor to compensate for physiological differences between men and women but that the amount of physical exertion required is the key concept.

The Court found that there were significant differences between the two positions and affirmed the District Court's finding as not clearly erroneous. The dissenting justice opined that the District Court thought that the test was whether the jobs were the same rather than whether they were substantially the same as is proper, and would have reversed and remanded.

Court of Appeals - 5th Circuit
PANTCHENKO v. C.B. DOLGE CO.
581 F.2d 1052 (1978)

FACTS: Plaintiff filed suit under Title VII and the Equal Pay Act against defendant manufacturer alleging discriminatory treatment. She further alleged retaliation for having filed a previous charge with EEOC in that defendant refused to give her a letter of reference after she left its employ and disseminated disparaging and untrue statements to prospective employers. The District Court rendered judgment for the defendant regarding discrimination and rendered summary judgment on the retaliation allegation in that plaintiff was no longer an employee of the defendant when the alleged retaliation occurred.

ISSUE: Is the allegation of retaliation cognizable under Title VII?

DISCUSSION: On the issue of discrimination vel non, the Court of Appeals upheld the District Court's judgment as not clearly erroneous. Regarding plaintiff's claims of retaliation, the court noted that 42 USC 2000e-3 (704) of Title VII states that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has made a charge... under this subchapter." "Employee" is defined in the Act as "an individual employed by an employer".

The court held that when read literally, the language of the court may be construed to require that an employment relationship exist at the time of the challenged conduct. Such a narrow construction would not give effect to the statutory purpose which is to furnish a remedy against an employer's use of discriminatory practices in connection with a prospective, present or past employment relationship to cause harm to another. Accordingly, the term "employee" as used in the statute includes former employees. The statute prohibits discrimination related to or arising out of an employment relationship whether or not the person discriminated against is an employee at the time the discrimination occurred. Although there may be no requirement that an employer provide a reference for a former employee, the plaintiff clearly alleged that the reference was refused in retaliation for her efforts to challenge defendant's allegedly discriminatory conduct by filing a charge. This is sufficient to state a claim under Title VII.

Accordingly, the Court of Appeals reversed the District Court's grant of summary judgment regarding plaintiff's allegation of retaliation and remanded for further proceedings.

Court of Appeals - 2nd Circuit
FULLILOVE v. KREPS
584 F.2d 600 (1978) certiorari granted

FACTS: Plaintiffs (associations of contractors and subcontractors) challenged the constitutionality of section 103(f)(2) of the Public Works Employment Act of 1977 which states that no grant shall be made under the Act for any local public works project unless the applicant gives satisfactory assurances to the Secretary that at least 10 percent of the amount of each grant shall be expended for minority business enterprises. The District Court found that the provision was constitutional and dismissed the complaint.

ISSUE: Is the challenged provision a valid exercise of Congressional power to remedy the effects of past discrimination?

DISCUSSION: At the outset, the Court of Appeals noted that when Congress seeks to exercise its spending powers, it is required to distribute Federal funds in a manner that does not violate the equal protection right of any group and that the defendant acknowledged that in enacting the provision in question, Congress had created an explicitly race based condition on the receipt of grant funds.

The court found that in considering whether the racial classification was permissible, Congressional purpose was relevant. Finding that a large measure of judicial restraint and deference must be accorded to Congressional enactments (more so than that which would be accorded a State statute) the court concluded that it was beyond dispute that the set aside was intended to remedy past discrimination and that any purpose Congress might have had other than to remedy the effects of past discrimination would be difficult to imagine. The court cited several remarks in the legislative history to support this conclusion as well as a Department of Commerce report which was considered by the Congressional Committee, while noting that the absence of a specific finding of discrimination in the committee report may be troublesome. The court cited Bakke in support of its view that in employment discrimination cases, it is well established that the government's interest in overcoming the disadvantages resulting from past race discrimination is sufficiently compelling to justify a remedy which requires the use of racial preference. The court stressed that affirmative action ordered as equitable relief must not exceed the boundaries of fundamental fairness and cited with approbation the Kirkland doctrine that such a remedy must not concentrate upon a relatively small ascertainable group of non-minorities. The court found that the statute in question falls well within such boundaries in that the set aside applied only to a small amount of funds, the burden of being disadvantaged by the program was thinly spread among non-minority firms. The court concluded that it was not inequitable

to exclude majority firms from competing for this small amount of business for a short time because such firms have benefitted in the past by not having to compete against majority businesses. The judgment of the District Court was affirmed.

Court of Appeals - 2nd Circuit
PALMER v. TICCIONE
576 F.2d 459 (1978)

FACTS: Plaintiff, a school teacher, was forced to retire at the end of this school year because she had reached age 70. It was not disputed that she was willing and able to continue teaching.

Plaintiff filed suit under 42 USC 1983 alleging age discrimination. Specifically, she alleged violation of the Equal Protection Clause because the statute created an irrebuttable presumption of incompetence based on age.

ISSUE: Does the statute under attack violate the Equal Protection Clause of the 14th Amendment?

DISCUSSION: The Court of Appeals noted that in Massachusetts Board of Retirement v. Murgia 427 US 307, the Supreme Court upheld mandatory retirement at age 50 for policemen. The Court found that in cases such as this, if a rational basis for defendant's action could be shown, the court would not conclude that the Equal Protection Clause had been violated. The court stressed prior cases which sustained compulsory retirement statutes for occupations that involve primarily mental skills. Taking cognizance of Gault v. Garrison, 569 F2d 993 (7th) which struck down a compulsory retirement statute for teachers, the court held that that decision too narrowly conceived the possible rational basis for such a statute (i.e., the loss of mental rigor coinciding with advancing age). The court noted that such a statute might have the purpose of opening up employment opportunities for young teachers, bringing in young people with fresh ideas and techniques, or to assure predictability and ease in establishing and administering a pension plan.

Plaintiff contended on appeal that, since under Murgia the statute under attack must "rationally (further) the purpose identified by the statute," the court may only look to the purpose of the law. Inasmuch as the provision in the New York statute was part of a law governing retirement benefits, plaintiff concluded that its only purpose could be to further the efficient distribution of retirement benefits. Inasmuch as a mandatory age 70 retirement policy was discretionary with employers, and therefore, an element of unpredictability existed, plaintiff concluded that the provision defeats the purpose of the statutory scheme by putting employees on the retirement rolls unnecessarily.

Conceding that the statute permits individual school boards to implement compulsory retirement policies, the court held that the purpose may be to further any of the policies mentioned above without regard to the narrow context of the statute and was therefore rationally related.

Regarding plaintiff's allegation concerning an irrebuttable presumption, the court held that if a policy of a statute is rationally based it should not fall because it is labeled a presumption. The court held that the Equal Protection Clause of the Constitution was not violated and affirmed the judgment of the District Court.

Court of Appeals - 2nd Circuit
ASSOCIATION AGAINST DISCRIMINATION v. CITY OF BRIDGEPORT
19 FEP 115 (1979)

FACTS: Ten blacks and Hispanics filed suit against defendants under Title VII alleging discrimination regarding hiring in the fire department. Several incumbent white firefighters were allowed to intervene as defendants. The District Court found discrimination based on disparate impact (minorities constituted 41 percent of the population but only 0.2 percent of the firefighters) and found the firefighter examination not to be substantially business related. The court enjoined defendant from using the examination and directed that it hire all blacks and Hispanics who had filed an application to take the exam if they met physical, residency, and other objective requirements. The hiring of only minority applicants was to continue until the number of minorities hired since 1975 (when the examination was administered) equalled the number of whites hired since that time. Thereafter, whites and minorities were to be hired on a one to one ratio until the number of minority firefighters totalled 125.

ISSUE: Was the scope of relief instituted by the District Court proper?

DISCUSSION: The Court of Appeals noted that cases involving quota relief have created strong differences of opinion among and within the various circuits. The court cited Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, which held that quota relief can constitutionally be justified only if necessary to redress a clearcut pattern of long, continued and egregious racial discrimination and if the reverse discriminatory effects of the quota do not fall upon a small number of readily identifiable nonminority persons. While the court conceded that those conditions on imposition of quotas may not reflect the views of all members of the second circuit or even those on the panel in this case, the views expressed in Kirkland command considerable support. Finding that the District Court did not refer to any of the second circuit's decisions in issuing its order, the court remanded the case instructing it to clarify the theories on which its order was based and to explain why the quotas required a hiring ratio of one to one when minorities only constituted 11 percent of those who took the test.

The court further noted that the disparate impact in this case was created by the arbitrary passing score (75 percent correct answers) which was required by the city charter. Although the District Court correctly characterized application of the requirement to the firefighter examination as bearing no relation to job proficiency, the Court of Appeals pointed out that defendants conceded that the test was not scored properly and had urged the judge to lower the passing score. This would have eliminated most of the disparate impact in the first instance. The Court of Appeals found that had the passing score been lowered as suggested by defendants, there would have been no showing of disparate impact and there would have been no need to decide whether

the test was job related. The court found that a plan which accepts the reduction of the passing score and treats the list as a qualifying list without ranking would, as an interim measure, afford substantial minority representation and be acceptable as part of an overall settlement. The case was remanded for further consideration of the matters discussed in the Court of Appeal's decision.

Court of Appeals - 3rd Circuit
OBURN v. SHAPP

521 F. 2d 142 (1975)

FACTS: This class action was brought under 42 U.S.C. 1981, 1983, alleging reverse discrimination resulting from the implementation of an affirmative action plan requiring a one-to-three minority hiring ratio. White applicants for the position of Pennsylvania State Trooper claimed that they had received higher passing scores on a written examination than their black counterparts, but were not permitted to complete the subsequent selection procedures. Their rejection, they allege, was an unconstitutional denial of equal protection because they were eliminated from further processing on account of race. The District Court denied plaintiff's request for preliminary injunction.

ISSUE: Was there a reasonable possibility that plaintiffs would succeed in proving discrimination in a trial on the merits so as to justify granting a preliminary injunction?

DISCUSSION: The Court of Appeals held that the District Court did not abuse its discretion in denying plaintiff's request for a preliminary injunction. Classifications based on race are not unconstitutional per se but merely require close judicial scrutiny to find as justification a compelling State interest. The court found that defendant's use of racial quotas to end the perpetuation of past discrimination was based on a compelling State interest.

Court of Appeals - 3rd Circuit
EEOC v. AT & T
556 F.2d 167 (1977)

FACTS: The plaintiffs, (EEOC, the Secretary of Labor, and the United States), filed suit against the defendant alleging discrimination under Title VII, the Fair Labor Standards Act and Executive Order 11246. The defendant denied the allegation but simultaneously approved and consented to a District Court decree which embodied and was designed to enforce a negotiated agreement under which the defendant undertook to implement a model affirmative action program including goals and targets. That program was designed to overcome the effects of past discrimination regarding blacks, women, and other minorities. It provided that when a target is not achieved applying normal selection standards, defendant must depart from these standards and pass over candidates with greater seniority or better qualifications and select members of minorities who are basically qualified. (This is designated an "affirmative action override.") Such a selection does not result in any increase in seniority for purpose of layoffs and rehires, matters which are controlled by the collective bargaining agreement.

The unions intervened in the proceedings contending that the consent decree conflicted with provisions of the collective bargaining agreement between them and the defendant and unlawfully invaded rights of their members respecting competitive seniority in transfer and promotion.

ISSUE: Does Title VII and the U.S. Constitution permit the affirmative action override and quota and target relief for members of an entire class?

DISCUSSION: The Court of Appeals found that the collective bargaining agreement embodied a merit selection system wherein management determines who is best qualified but seniority decides the issue where two employees are considered by management to be equally qualified. According to the court, the real dispute is less about seniority than over the departure from the best qualified criterion. The court held that Title VII does not prohibit a District Court from providing for an affirmative action plan containing interim targets and goals and a program which overrides the collective bargaining agreement as in this instance in that the Act's prohibitions (section 703) are not designed to be a statutory limitation upon the remedial authority conferred on District Courts by section 706(g). The court also rejected the unions' contention that quota relief is prohibited by 706(g). The unions also argued that a remedy may only be provided in favor of identifiable victims of specific past discrimination. They contended that 706(g) proscribes any decree, even in a class action, which would permit relief to a minority group member who could not so identify himself. The court held that Executive Order 11246 was itself a valid effort to assure utilization of all segments of society in the available labor pool, and that broad governmental interest is sufficient to justify relief directed at classes rather than individual victims of discrimination. Regarding Title VII,

the court held that Congress did not intend remedies to be available only to those knowledgeable enough and militant enough to have demanded and to have been refused what was not, in fact, available. Further, it was not established that there was a significant number of minority members hired after the discriminatory practices in question had ceased who might be able to take advantage of the override. The court held, nonetheless, that once a prima facie showing is made that an employee has engaged in a practice which violates Title VII, the burden shifts to defendant to prove a benign justification or explanation. Nothing in the consent decree prevents the defendant from asserting that an individual minority member was not hired because of a legitimate reason and it is difficult to see what interests the unions have in the matter.

Regarding the unions' constitutional arguments, the court recognized that the remedy adopted by the District Court can operate to the disadvantage of members of groups which have not been discriminated against as compared to those groups which have been discriminated against. This constitutes Federal action which classifies by membership in racial and sexual groups, and must be held in violation of the Equal Protection Clause of the 14th amendment unless it can be shown that the interest in making the classification is sufficiently great. Racial classifications are subject to strict scrutiny. Classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. Here the Federal interest is that of rectifying the effects of a particular pattern of employment discrimination upon the balance of racial and sex groups that would otherwise have obtained -- an interest distinct from that of seeing that each individual is not disadvantaged by discrimination since it centers on the distribution of benefits among groups. This governmental interest in having all groups fairly represented in employment is substantial and therefore adverse effects on third parties is not a constitutional violation. Moreover, the same exclusion could conceivably result from remedies afforded to individual victims of discrimination. The affirmative action override is necessary to the practical accomplishment of the remedial goal. Goals and quotas are necessary to counteract the effects of discriminatory practices because some victims of discrimination no longer seek the job benefits which they were discriminatorily denied. In such cases, quotas are needed to counterract the effect of discriminatory practices upon the balance of sex and racial groups that would have otherwise obtained. The ruling of the District Court was affirmed.

Court of Appeals - 3rd Circuit
TOMKINS v. PUBLIC SERVICE E & GC
568 F.2d 1044 (1977)

FACTS: Plaintiff's supervisor allegedly made advances toward her indicating his desire to have sexual relations with her and stated that this would be necessary if they were to have a satisfactory working relationship. He threatened her with recriminations when rebuffed. Plaintiff filed suit alleging the failure of management to take adequate supervisory measures to prevent such incidents, that she was subjected to false and adverse employment evaluations, disciplinary layoffs, and the threat of demotion. She was ultimately discharged. The District Court dismissed her claim against the employer based on her supervisor's actions for failure to state a claim under Title VII.

ISSUE: Does an allegation concerning sexual advances state a case cognizable under Title VII?

DISCUSSION: The Court of Appeals held that in order to state a claim under section 703(a)(1) it is necessary that plaintiff establish both that the actions complained of constitute a condition of employment and that this condition was imposed on the basis of sex. The court also ruled that in characterizing the supervisor's behavior as an "abuse of authority," the District Court overlooked the major thrust of the complaint, i.e., that the plaintiff's employer acquiesced in her supervisor's action. The court found that the demands on plaintiff to submit to sexual advances constituted a condition of employment in that work related consequences would result from her refusal to yield. Concerning the issue of whether the condition was imposed because of her gender, the court dismissed defendant's contention that the supervisor could just have easily sought to satisfy his sexual urges with a male employee as hypothetical, stating that the complaint must be read in the light most favorable to plaintiff in determining whether a proper claim has been stated. The court held that when a supervisor with actual or constructive knowledge of the employer, makes sexual advances towards an employee and conditions the employee's job status on acquiescence, and the employer does not take prompt and appropriate remedial action, Title VII sex discrimination has been established. Accordingly, the Court of Appeals reversed the judgment of the District Court and remanded.

Court of Appeals - 4th Circuit
ARRIT v. GRISELL
567 F.2d 1267 (1977)

FACTS: Plaintiff's application for employment as a police officer was rejected on the sole ground that he was 40 years old under a law which established an 18-35 year age limit for applicants for original appointment. He filed suit under the ADEA and 42 USC 1983.

The District Court granted defendants motion to dismiss for failure to state a cause of action .

ISSUE: Was a bona fide occupational qualification shown in this case?

DISCUSSION: The Court of Appeals held that in order to assert successfully a bona fide occupational qualification defense, the defendant must show that (1) the BFOQ which it invokes is reasonably necessary to the essence of its business (here the operation of an efficient police department) and (2) the employer has reasonable cause i.e. a factual basis for believing that all or substantially all of the persons with the class (in this case persons over 35 years of age) would be unable to perform safely and efficiently the duties of the job involved or that it is impossible or impractical to deal with persons over the age limit on an individual basis. The District Court in this case did not allow plaintiff to rebut defendant's argument concerning BFOQ and accordingly, the case was remanded.

Regarding 42 USC 1983, the court held that the age classification did not impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class and, therefore, did not require strict judicial scrutiny. Persons subject to age-based classifications are not saddled with such disabilities and subjected to such a history of purposeful unequal treatment or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process. Accordingly, rationality is the proper standard to determine if an Equal Protection violation has occurred. The identified purpose of the statute, which is to protect the public by assuring the ability of the police to respond to the demands of their job, rationally furthers a legitimate state purpose and therefore, the District Court's rejection of plaintiff's Equal Protection claim was affirmed.

Court of Appeals -4th Circuit
JORDAN v. N.C. NATIONAL BANK

565 F. 2d. 72 (1977)

FACTS: Plaintiff unsuccessfully sought reemployment with defendant. She filed suit alleging that she was not rehired because of defendant's refusal to allow her to observe the tenets of her religion forbidding work on Saturday.

The District Court ruled in favor of the plaintiff, ordered defendant to offer her the next available vacancy and awarded back pay on the grounds that it had not made sufficient efforts to accommodate her religious beliefs.

ISSUE: Did the defendant violate Title VII in not attempting to accommodate plaintiff's religious beliefs.

DISCUSSION: The Court of Appeals (2-1) found that plaintiff's application stipulated that her employment must be accompanied by a "guarantee" that she would never be called upon to work on Saturday. The court held that plaintiff's "pre-requirement" on its face was so unlimited and absolute in scope that it bespoke its own unreasonableness and was thus, beyond accommodation. The Court noted that plaintiff was not content to request that the defendant weigh her religious preferences in the event of an emergency requiring work on Saturday. The court held that the granting of this "guarantee" would obligate the defendant to provide it for all its employees, would entail extra expenses, and would thus, constitute undue hardship. The Court reversed the District Court's ruling.

The dissenting justice found that plaintiff's request for a guarantee was an expression of the firmness and sincerity of her beliefs. The issue, he opined, was not the absoluteness of plaintiff's beliefs but that of reasonable accommodation in the context of possible undue hardship. Because defendant failed to ascertain whether or not there were vacancies which would not require Saturday work, the District Court was correct in concluding that defendant took no steps to offer reasonable accommodation. The dissenter found no evidence that if plaintiff's beliefs had been accommodated the employer would have to make similar concessions to other employees thus, creating additional expenses and undue hardship.

Court of Appeals - 4th Circuit
FRIEND v. LEIDINGER
588 F.2d 61 (1978)

FACTS: Black firefighters instituted a class action under Title VII alleging that the fire bureau engaged in racial discrimination. Specifically, they claimed that (1) when making decisions on promotion and grade level, defendants considered the number of garnishments of a firefighter's wages, (2) blacks involved in traffic accidents while using bureau vehicles were more often charged with causing the accidents than whites, thus adversely affecting promotional opportunities, (3) testing procedures had an adverse impact on blacks and were not sufficiently validated, (4) defendants utilized supervisory fitness ratings in determining promotions, thus adversely affecting blacks, and (5) management acquiesced in harassment of black firefighters by white firefighters.

The District Court rendered judgment for defendants.

ISSUE: Did a violation of Title VII occur?

DISCUSSION: (1) Garnishment: The record showed that the first time a garnishment is received by the bureau, the firefighter is counseled on his financial affairs. Subsequent garnishments result in a written reprimand but no further disciplinary action is taken. The Court upheld the District Court's finding that there was no testimony that blacks had been penalized in pay or promotions because of garnishment. The statistical showing was based on a small number of garnishments and plaintiff's statistical exhibits contained numerous errors. Accordingly, there was no proof that the policy regarding garnishments adversely affected blacks. Further, there is considerable inconvenience and expense to the bureau in handling paperwork regarding garnishments and bad community relationships are created when firefighters fail to pay their just debts. The court concluded that this could be construed as evidence of irresponsibility and could validly be considered in determining promotions so long as it is not a pretext for discrimination.

(2) Traffic Accidents: The record showed that blacks were found to be chargeable (i.e., negligent) in 76 percent of their accidents whereas whites were only found chargeable in 37 percent of their accidents by the Fire Bureau Accident Review Committee. The court upheld the District Court's finding that the statistical sample (98 accidents) was too small to be significant but that even if adverse impact were assumed, defendants had met their burden of showing a "compelling business necessity." (The court found no testimony that the Review Committee was biased and did not properly investigate accidents and truthfully report its findings. Plaintiffs have not shown that another system could serve the same purpose and eliminate adverse impact).

(3) Testing: The court noted that 24.8 percent of the Fire Bureau employees were black and that in the local area 26.1 percent of the population was black. Although the plaintiffs complained that the percentage of blacks eventually hired was only 18.6 percent as opposed to 32 percent of whites, the court found that the entry level test was properly validated. Although there was a dispute between the parties as to whether validation of the test should meet EEOC Guidelines or those prepared by the Federal Executive Agency on Employee Selection Procedures, the trial court found the latter to be the most recent and reliable. Courts need not look solely to the Guidelines in making their determinations of validity.

While the court noted that a part of the validation study was done in another part of the country, it found that this does not diminish the validity of the results because there was no difference in the duties of a fireman in the other geographical localities where the study was performed. "To require local validation in every city, village and hamlet would be ludicrous."

(4) Fitness Ratings: The court upheld the District Court's findings that in using figures comparing firemen with the same amount of seniority, blacks received "more than acceptable" ratings of higher 94.5 percent of the rate of white employees receiving the same ratings. Accordingly, no adverse impact was shown.

(5) Harassment: The court found that defendants' had taken corrective disciplinary action against white officers who had harassed blacks and that no named defendant was involved in such behavior.

The Court of Appeals, accordingly, affirmed the District Court's findings of no discrimination.

The dissenting justice would have found discriminatory harassment based on evidence of use of racial epithets, hazing of black firemen, segregation in some of the eating and sleeping quarters and more lenient treatment of whites in disciplinary situations. He opined that Congress, in enacting Title VII, intended to prevent employers from thwarting the Act merely by disavowing the conduct of their mid-level supervisors. The Bureau is accountable for discrimination conducted by its officers acting within the purview of its authority.

Court of Appeals -4th Circuit
LEWIS v. TOBACCO WORKERS
577 F. 2d. 1135 (1978)

FACTS: Black employees filed a class action alleging that defendant segregated white and black employees by means of discrimination in initial job assignment policies. Specifically, they claimed that the defendant purposefully assigned black employees to the department of the factory which afforded least advancement and which involved seasonal work. Although finding a lack of intentional discrimination, the District Court found that black employees believed that the company discriminated and held the defendant liable because it did not inform all applicants for seasonal jobs that there were jobs available in the three other departments and that it hired without regard for race. It ordered recovery of damages to class members who were not so advised and who believed that their race limited their employment opportunities.

ISSUE: Were the District Court's findings of discrimination and its basis for remedial relief proper?

DISCUSSION: The Court of Appeals found that so far as the District Court's opinion was based on defendant's failure to reassert a balance in its work force, it erred. Title VII does not require a racially balanced work force and specifically states that liability may not be based solely on the existence of a racial imbalance where there is an absence of purposeful discrimination. Examining the racial imbalance of the work force, the Court of Appeals found that in the most desirable department of the company, and the third most desirable, the percentage of white and black employees was not different enough from the makeup of the local work force to permit an inference of discrimination. In the second most desirable department, the court found that black employees predominated. Regarding seasonal employment, the court found that hiring of black and white employees was proportional to applications received. Accordingly, the statistics do not support a prima facie case of discrimination.

The court further found that it was impermissible to base recovery on the subjective belief of plaintiffs. The only relevant question is whether the defendant in fact, discriminated. Neither did the defendant have an obligation to advise applicants of other available positions when it treated applicants of all race the same.

The court vacated the District Court's judgment regarding the issue of racial discrimination and ordered the complaint dismissed.

Court of Appeals - 4th Circuit
SLEDGE v. J. P. STEVENS & CO., INC.
585 F.2d 625 (1978)

FACTS: Blacks who were past and present employees and applicants for employment with defendant, filed individual and class actions under Title VII and 42 USC 1981. The District Court dismissed the individual suits but held that the defendant had violated Title VII and 1981. Specifically, the court found that a prima facie case had been established by statistical evidence concerning seemingly neutral practices and that defendant had not rebutted this showing. The court enjoined discriminatory activity and awarded backpay to class members.

Subsequently, the court entered a decree imposing a broad and detailed regime of continuing affirmative obligations on the defendant, including strict racial quotas in hiring, job placement and promotion. The court also set specific wage criteria for job assignments and ordered that departmental seniority for blacks be replaced by a constructive plant seniority plan. Further, job bidding procedures, red circling of wages, and bumping standards were imposed.

ISSUE: (1) Did the District Court apply the proper burden of proof?
(2) Was the imposition of quota relief proper in this case?
(3) Was the alteration of defendant's seniority provisions by the District Court decree proper?

DISCUSSION: Focusing on the "because of" language of section 703(a) of Title VII, the defendant suggested that it was incumbent upon the plaintiff to demonstrate not only that they as a class were disfavored but also that this was the result of practices which were racially discriminatory. It was argued that the statistics used to establish that the class was less favorably situated than whites were by their nature inconclusive on the issue of causation. The court found that this argument elided the appropriate allocation of the burden of proof. Plaintiffs in the context of a discriminatory impact case, were not required to prove intent. They only needed to show that the effect of facially neutral employment practices was to discriminate against them as a group. Based on the statistical evidence as well as the proof which showed that defendant, based on its employment decisions upon the subjective opinions of white supervisors, an inference may be drawn. Finding that defendant's attempts to meet its burden of rebutting plaintiff's prima facie case were unsuccessful, the court affirmed the findings of discrimination entered by the District Court. (Regarding the defendant's use of seniority to define layoff and recall rights, the court reversed the District Court's finding of discrimination citing section 703(h) and Teamsters as concerns neutral, good faith seniority systems which perpetuate the effects of past discriminatory practices.)

Regarding remedial action, the court found that the District Court was duty bound to render a decree which will eliminate the discriminatory effects of the past, as well as bar like discrimination in the future. The defendant argued that certain features of the decree amounted to pro-black and anti-white racial directives which will result in the demoralization of black and white employees and would work a reversal of the aims of EEO legislation.

The court found that red circling of wages and seniority relief have consistently been upheld and are acceptable tools for the eradication of the practices covered by Title VII. However, the court limited seniority relief to those black employees who suffered discrimination and not to all black employees as the District Court's decree provided.

Regarding the District Court's one to one hiring quota, the court found that, assuming quotas are permissible elments of remedial relief in employment discrimination cases, they are appropriate only under limited and compelling circumstances. Where effective relief can otherwise be afforded or where an employer, subsequent to the effective date of Title VII, has made convincing and satisfactory progress toward the goal of equal hiring opportunities for all races, it will ordinarily be unnecessary for the courts to consider the imposition of quotas. Whether the discrimination has been egregious, purposeful, or blatant is an important consideration in determining the need for quota relief. in this case, the District Court specifically found that defendant had not consciously engaged in discriminatory employment practices or deliberately violated either Title VII or 1981. The Court of Appeals concluded from this that defendant had rebutted the argument that the discrimination had been flagrant. Moreover, the evidence shows that during the pendency of the litigation, substantial progress was made in removing the disparities in the hiring of blacks. Without deciding the issue of whether quotas are permissible, the court held that in this case, effective relief could have been granted without resort to them, i.e., by means of those aspects of the District Court's decree which addressed the defendants policy of relying upon the subjective conclusions of white supervisors, the failure to establish objective hiring guidelines, and the failure to post vacancies inter alia. In the future, the District Court may reconsider whether the decree sans quotas is working and if not, address the question of whether such remedial action is permissible. The court also struck down the District Court's decree insofar as it ordered promotional quotas, noting its apprehension that the implementation of these provisions may cause considerable hardship if not disruption of the operation of defendant's business as well as adverse consequences on individual employees, including in some instances members of the protected class.

The court disapproved of the portion of the remedial decree which altered defendant's practice of choosing employees for layoff in the affected job category. Specifically, the decree provided that black employees who would otherwise be laid off could "bump" white employees with less plantwide seniority regardless of department, provided that the job could be performed by the class member with reasonable training. The court found that bumping is an unsettling process whose domino effect adversely affects employees who have done no wrong and who may

have been the victim of discrimination. The decree would require the significant alteration of a seniority system which itself is not lawful. While the court was unprepared to hold that Title VII insulates bona fide seniority systems from findings of illegality and renders them completely immune to judicial alteration, it opined that in this case such alteration is unnecessary. The judgment of the District Court was affirmed in part and reversed in part as outlined above.

Court of Appeals - 5th Circuit
U.S v. GEORGIA POWER CO.

474 F2d 906 (1973)

FACTS: The Attorney General filed a "pattern or practice" suit under section 707 of Title VII of the Civil Rights Act of 1964 which was consolidated with two private class action suits into one single action against defendant. Until 1963, defendant engaged in an open and unvarying policy of discrimination against blacks. Although this policy terminated that year, as of 1970, only 543 of the company's 7,515 employees were black (7.7%) despite the existence of a large potential pool of black applicants. Aside from individual discrimination, company-wide policies tended to perpetuate the effects of past discrimination; specifically, the defendant's high school diploma requirement, written exams, and recruitment techniques.

ISSUES: (1) Did the defendant make a substantial showing of business necessity for its testing and high school diploma requirements? (2) Is plaintiff class entitled to a back pay award? (3) Is the effect of informal, word of mouth recruiting a continuation of past discrimination?

DISCUSSION: After plaintiff demonstrated that the written exams caused a disproportionate impact on blacks, defendant had the burden of showing that they were job-related and necessary for the efficient operation of the business. The court stated that EEOC Guidelines on test validation should be followed unless there is compelling reason for not doing so. Since the defendant failed to follow the Guidelines, the court remanded the case back to the District Court to give defendant another chance to comply. In addition, the court struck down the high school requirement because it was unnecessary to the successful performance of the jobs. As for the question of back pay, section 706 (g) gives plaintiff a statutory right to back pay if the court finds in its discretion that such an award is warranted. Under section 707(a), which authorizes the Attorney General to bring "pattern or practice" suits, the statute restricts relief to "permanent or temporary injunction, restraining order or other order." (emphasis added). The court finds that even though Congress failed to mention back pay in the latter section, it contemplated no less. The court remanded this issue back to the District Court.

Word of mouth recruitment, although neutral on its face, operates as a "built-in-headwind" to blacks and is not justified by business necessity. The court decided that the lower court abused its discretion by not ordering affirmative relief to contradict the discriminatory impact of this employment practice.

Court of Appeals - 5th Circuit

NAACP v. ALLEN

493 F. 2d 614 (1974)

FACTS: Plaintiff brought this class action under 42 U.S.C. 1983 on behalf of its members and all similarly situated blacks in the State of Alabama, alleging that defendants have followed a continuous and pervasive pattern and practice of excluding blacks from employment in the Department of Public Safety. The District Court found that in the 37 year history of the patrol (State troopers are a subdivision of this department), there has never been a black trooper and the only blacks ever employed by the department were non-merit system laborers. The lower Court concluded that the written examination administered to trooper cadet applicants had never been validated although it clearly disqualified a disproportionate number of blacks. While it refused to order new tests, mainly because of administrative inconvenience, it enjoined further discrimination by defendants and decreed that defendants hire one black for each white until approximately 25 percent of the personnel are black.

ISSUE: Does quota hiring relief result in unconstitutional discrimination against eligible white applicants?

DISCUSSION: The Court of Appeals, following its recent decision in Morrow v. Crisler, 491 F.2d 1053 , affirmed the District Court's decision with regard to the hiring quota. The facts of this case particularly warrant such relief. Since the District Court refused to enjoin the use of the tests which were not validated, defendants would perpetuate the effects of past discrimination even though it would apply the test in a neutral fashion. Hiring quotas would offset any adverse effect of a test not shown to be job-related. In addition, plaintiffs had proven a long history of intentional discrimination and a present lack of effort to actively recruit minorities. The court concluded that a hiring quota under this factual situation is not unconstitutional since it furthers a compelling State interest and yet does not violate anyone's protected rights under the Constitution. The court noted, however, that quota relief should be limited in duration and reserved for situations where lesser measures have failed, or could be expected to fail.

Court of Appeals - 5th Circuit

PETTWAY v. AMERICAN CAST IRON PIPE COMPANY

494 F2d 211 (1974)

FACTS: Black employees brought a class action suit under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981 requesting equitable relief and damages for discrimination practiced by the employer in its hiring, promotion, and apprenticeship programs. Until 1961, the company engaged in overt, intentional discrimination; from 1964 to 1971, defendant made use of testing procedures and a high school diploma as criteria for hiring and promotion, which the District Court found to have an adverse impact on the employment opportunities for blacks. Since 1971, defendant has utilized departmental seniority system and an apprenticeship program that requires, among other prerequisites, a high school diploma.

ISSUES: (1) Does departmental seniority, although neutral on its face, constitute discrimination in violation of Title VII when practiced by a company that in the past has overtly discriminated against blacks? (2) Can a high school education requirement be justified, under Title VII, on the basis of "business necessity" even though it perpetuates the consequences of past discrimination?

DISCUSSION: Plaintiffs established proof that past discriminatory employment practices have resulted in racial stratification in pay, jobs, and departments through the use of comparative statistical evidence. In a footnote, the court noted the importance of statistical evidence used to establish a prima facie case of discrimination in Title VII cases within the 5th Circuit. Holding that the statistics establish a case of racial stratification within the company, the court found that the departmental seniority system deters blacks from transfer or promotion to a different department due to a lack of seniority.

The Court also found that the high school educational criterion for the apprenticeship program has a disproportionate impact on black employees. Therefore, the defendant has the burden of establishing a "business necessity" for the criterion in order not to violate Title VII. In the area of testing and educational requirements, the Supreme Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971) has set the standard of what business necessity demands: that the requirement "bear a demonstrable relationship to successful performance of the jobs for which it was used." The Court held that a certain reading level necessary for the apprentice program cannot be equated with a requirement for a high school education.

Therefore, the court granted injunctive relief by requiring adoption of a plant-wide seniority system. The court also awarded back pay to all members of the class including those who had not filed charges with the EEOC.

Court of Appeals - 5th Circuit
ROBINSON v. DALLAS

514 F.2d 1271 (1975)

FACTS: Plaintiff began working for the defendant in 1970. In 1973 he was disciplined and discharged pursuant to a City personnel rule which authorized disciplining employees who fail to pay "just debts." He alleged in his complaint that the rule discriminates against blacks and therefore violate Title VII of the Civil Rights Act of 1964. In support of this allegation, the plaintiff illustrated the statistical effect of the rule. Those statisticsindicated that seven employees, three of whom were black, were disciplined under the "just debts" rule in the period 1965-1973.

ISSUE: Are plaintiff's statistics sufficient evidence to establish a prima facie case of discrimination against defendant under Title VII?

DISCUSSION: The Court of Appeals held that plaintiff has the initial burden to establish that a practice has a discriminatory effect. Although statistics alone may demonstrate such effect, the court held that plaintiff's statistics were not sufficient to establish a discriminatory effect on blacks in that; the small size of the sample could not convince the court that the "just debts" rule was a violation of Title VII. Plaintiff argued that poor people are more likely not to pay their debts and, since blacks comprise a disproportionately large percentage of the poor, the "just debts" rule must therefore have disproportionate effect on blacks. The court refused to accept the first part of this premise and further noted that the rule does not apply to blacks in general but only to black employees of the defendant. Therefore, the relevant inquiry must focus on whether defendant black employees fail to pay their debts more frequently that white employees. Plaintiff did not address this issue.

Court of Appeals - 5th Circuit

WILLINGHAM v. MACON TELEGRAPH PUBLISHING COMPANY

507 F2d 1084 (1975)

FACTS: Plaintiff brought this individual action under Title VII of the Civil Rights Act of 1964. Defendant, as a newspaper establishment in a community, felt it had a legitimate interest to maintain favorable relations with the residents of the community with whom it conducts business Pursuant to this interest, defendant promulgated a grooming code requiring male and female employees who came in contact with the public to be neatly dressed and groomed in accordance with standards generally accepted in the business community. Defendant interpreted its regulations to exclude employment of men with long hair. Plaintiff was denied employment for this reason and alleged that defendant's regulation as interpreted is sex discrimination because if he were a female with identical length of hair, he would have been employed?

ISSUE: Does a grooming code that excludes males with long hair but does not exclude females similarly situated constitute sex discrimination under section 703 of Title VII?

DISCUSSION: The type of discrimination at issue in this case involves what the court terms "sex-plus." Defendant is not refusing to hire males in general but only males with one seemingly neutral characteristic: long hair. Although Title VII only speaks to sex discrimination, the Supreme Court, in Phillips v. Martin Marietta Corp, 400 U.S. 542, (1971), expressly found that "sex-plus" discrimination violates the 1964 Civil Rights Act. The EEOC has supported plaintiff's position that grooming codes which distinguish between sexes are violations of section 703 Title VII.

The court, however, declined to accept the EEOC's position noting that the purpose of Title VII is to afford equal access to employment opportunities. The court distinguished between "sex-plus" discrimination involving a fundamental characteristic of one sex and characteristics, as with long hair, that have an insignificant effect on job opportunities. In Phillips, supra, the court struck down a distinction based on having pre-school age children. The present case does not involve the fundamental characteristics of males. Grooming regulations do not significantly bar employment opportunities; rather, they are more closely related to the efficient operation of a business. As a result, the Court holds that Title VII has not been violated.

Court of Appeals -5th Circuit
STROUD v. DELTA AIRLINES
544 F. 2d 892 (1977)

FACTS: Defendant had a policy of not employing any married women as stewardesses. (It did not hire any men for this position.) Due to her imminent marriage, plaintiff resigned and was subsequently denied reinstatement. She filed suit under Title VII alleging sex discrimination. The District Court entered judgment for the defendant.

ISSUE: Did the plaintiff state a claim of sex discrimination cognizable under Title VII?

DISCUSSION: The Court of Appeals held that any question as to whether discrimination against married women was maintainable under Title VII was resolved by Phillips v. Martin Marietta, where the Supreme Court rejected the argument that discrimination between different classes of women (know as "sex plus discrimination") was outside the ambit of the Act. The court noted, however, that the 3rd Circuit had held that discrimination against married women constitutes discrimnation based on sex only if a different standard, i.e. , the marital status of the person has been applied to men and women . The evidence in this case showed that Delta only hired women as stewardesses during the time frame involved in this case. Although this is itself a violation of Title VII, plaintiff is not a person who may assert the rights of a prospective male flight attendant. The barriers which Congress sought to remove by passing Title VII were those which operate to favor one sex group over the other. Here plaintiff is not a member of the relevant identifiable class which has been discountenanced in favor of another such class. If plaintiff suffered discrimination, it was a result of marriage and not sex. Men were not favored over women. They simply were not involved. Title VII does not bar all discrimination -- only the specific forms enumerated by statute. The holding of the District Court was affirmed.

Court of Appeals - 5th Circuit
PRICE v. MARYLAND CASUALTY
561 F.2d 609 (1977)

FACTS: Plaintiff brought suit under the Age Discrimination in Employment Act (ADEA) alleging that his employer forced him to take early retirement utilizing impermissible age considerations. The District Court found that the defendant had been dissatisfied with the small volume of business generated from the office in which plaintiff worked. Accordingly, management decided to reduce that office's expenditures by terminating one of three market representatives. Utilizing supervisory evaluations and the comments of other officials who had observed the three employees, management decided to terminate plaintiff based on his lower productivity and lack of flexibility, initiative, and sophisticated knowledge of the work.

ISSUE: What standards of proof apply to a suit brought under the Age Discrimination in Employment Act?

DISCUSSION: The Court of Appeals stated that in an ADEA action the burden of proof lies with the plaintiff. While the establishment of a prima facie case requires the defendant to come forward with evidence demonstrating reasonable factors other than age in justifying an employee's discharge, the burden of proof does not shift to the defendant. The Court held that the McDonnell Douglas standard applies to ADEA cases and that in order to prove a prima facie case, plaintiff must show that (1) he is a member of the protected age group; (2) he was discharged; (3) he was replaced with a person outside the protected group; and that (4) he was qualified to do the job. The court found that plaintiff did not meet the third element in that no one was hired to replace him. The court opined that had plaintiff made out a prima facie case, reasonable factors other than age had been adduced to justify his discharge. The Court of Appeals affirmed the judgment of the District Court.

Court of Appeals - 5th Circuit
MARSHALL v. GOODYEAR TIRE & RUBBER
554 F.2d 730 (1977)

FACTS: The Secretary of Labor filed suit against defendant alleging a violation of the ADEA concerning the discharge of an employee. The District Court entered judgment for the plaintiff and ordered a nationwide injunction against further violations.

ISSUE: (1) Was the scope of the injunctive relief proper? (2) What is the proper standard for establishing a prima facie case under the ADEA?

DISCUSSION: The Court of Appeals found that the injunctive relief ordered in this case was too broad. The ADEA authorizes District Courts to grant "equitable relief as may be appropriate." The court held that an injunction is only appropriate where the facts indicate a company policy or practice in violation of the statute. Here the District Court relied solely on the discharge of one employee for its order and made no finding of a discriminatory company policy of practice. The court remanded the case in order that the District Court reconsider the relief that it granted and to determine if the defendant's actions evidenced a storewide (as opposed to nationwide) policy of age discrimination, in which case a more limited injunction might be in order.

Defendant contended on appeal that the test for a prima facie case under the ADEA should parallel that set forth in McDonnell Douglas v. Green and that a plaintiff should be required to show that (1) he was a member of the protected age group; (2) he was discharged; (3) his replacement was outside the protected group; and (4) plaintiff was able to perform his job.

Noting that McDonnell Douglas does not establish an immutable definition of prima facie case and that the evidence in this case showed that defendant placed an advertisement specifying that applicants be between age 19 and 26, the court held that plaintiff had proved a prima facie case by showing that (1) plaintiff was in the protected group; (2) he was discharged; (3) defendant sought to replace him with a younger person; and (4) he was replaced by a younger person outside the protected group.

The court upheld the judgment of the District Court that defendant did not go forward with sufficient evidence to rebut plaintiff's prima facie case of age discrimination and affirmed the judgment on the merits.

Court of Appeals - 5th Circuit
LOPER v. AMERICAN AIRLINES
582 F.2d 956 (1978)

FACTS: Plaintiffs filed suit against defendant airline charging sex discrimination and challenging defendant's policy that flight attendants must retire at age 32 and those who marry must resign. The District Court entered summary judgment for the defendant. Plaintiff appealed.

ISSUE: Did defendant's policies constitute sex discrimination in violation of Title VII?

DISCUSSION: The Court of Appeals held that since men were not hired as flight attendants until after the forced resignations in question, plaintiff did not receive treatment different from men. The court found that the fact that defendant did not apply age and marriage policies to other job classifications does not bolster plaintiff's Title VII claim because the airlines policy distinguished between flight attendants and other job classifications and not between the sexes. Accordingly, the judgment of the District Court was affirmed.

Court of Appeals -5th Circuit
CORLEY v. JACKSON POLICE DEPARTMENT
566 F. 2d 994 (1978)

FACTS: Plaintiffs alleged in a suit brought under Title VII that they were discharged from their policeman positions because of their race and because of their opposition to defendant's discriminatory practices. Defendant responded that plaintiffs were discharged solely because they accepted bribes. Plaintiffs then alleged that this justification was pretextual in that other officers were accused of taking bribes but that the matter was not investigated and they were not discharged. The District Court found for the defendant.

ISSUE: Did the District Court apply the proper burden of proof in finding that evidence of pretext was irrelevant?

DISCUSSION: The Court of Appeals found that plaintiffs were the first two black police officers hired (and that they and the few other black police officers hired before 1970 were the victims of open discrimination). The Court agreed with the District Court's view that plaintiffs had established a prima facie case of discrimination. The Court held, however, that the District Court failed to follow the proper burden of proof in holding that regardless of allegations and evidence of pretext, a legitimate, non-discriminatory reason for discharge suffices to rebut a prima facie case of discrimination. The Court held that in so doing the District Court confused the issue of whether the employees actually committed the crime upon which their discharge was based with the issue of whether the crime committed was used as a pretext for discrimination i.e., whether the employer applied the same criteria to other employees accused of the same or comparable offenses. The District Court did not address the relevant evidence of pretext such as why the accusations against the other policemen were not investigated. Such evidence is not collateral as the District Court maintained, but an indispensable element of the plaintiff's case which must be confronted by the trial Court. Rather than beclouding the issue, such evidence sharply defines it. The Court reversed and remanded for a new trial in accordance with its opinion.

Court of Appeals - 5th Circuit
MORROW v. DILLARD
580 F.2d 1284 (1978)

FACTS: Plaintiffs, who were unsuccessful applicants for positions with the Highway Safety Patrol, instituted a class action under 42 USC 1981, 42 USC 1983, Title VII, and the 14th Amendment. The District Court held that the statistical evidence showed unintentional albeit discriminatory hiring practices. The court turned down plaintiff's request that hiring quotas be imposed and ordered injunctive relief and affirmative action oriented to the black population.

A Court of Appeals panel affirmed. Upon hearing the case en banc, the full Court of Appeals found that it was incontestable that the Patrol engaged in unconstitutional discrimination but found the District Court relief to be insufficient. The court remanded the case with the instruction that affirmative hiring relief be established until the Patrol is effectively integrated. The District Court, on remand, ordered the patrol to temporarily offer first employment to every black applicant who met the minimum qualifications for the position in question.

ISSUE: Did the District Court abuse its discretion in affording race conscious affirmative relief?

DISCUSSION: The Court of Appeals found its prior en banc decision to be consistent with the Supreme Court's decision in Bakke. In exercising their equitable powers, Federal Courts may consider race in endeavoring to eliminate the discriminatory effects of the past. A District Court's remedial decree must be "reasonable, feasible, workable, effective, and realistic" and must correct the condition which offends the Constitution by balancing individual and collective interests.

The case at hand is analogous to NAACP v. Allen wherein a temporary racial quota was imposed and the court stated that "It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justified temporary, carefully circumscribed resort to racial criteria, wherein the chancellor (the District Court) determines that it represents the only rational, non-arbitrary means of eradicating (the) past evils." The relief ordered in this case is far less restrictive than the quota based relief in Allen. Neither underqualified nor unqualified blacks will be employed. The relief ordered is necessary to eliminate the discrimination in hiring practiced by the defendant and "to change the outward and visible signs of yesterday's racial distinction and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices." The remedial relief ordered by the District Court was upheld by the Court of Appeals.

Court of Appeals - 5th circuit
WILLIAMS v. DEKALB COUNTY
577 F.2d 248 (1978)

FACTS: Plaintiffs brought a class action under 42 USC 1981 challenging racial discrimination in hiring, job assignments, promotions, and discharge procedures. The District Court entered judgment for the defendant.

ISSUE: Is proof of purposeful discrimination required in proving a prima facie case under 42 USC 1981?

DISCUSSION: The Court of Appeals initially affirmed the District Court's finding that plaintiffs had made out a prima facie case of racial discrimination based solely on statistical evidence but found that the defendants did not carry their burden of showing that the actions which adversely affected plaintiffs were not racially motivated.

Subsequently, upon rehearing, the court modified its decision. The court interpreted the Supreme Court's opinion in Washington v. Davis to require a showing of purposeful discrimination in a case brought under 1981 before casting the burden on the defendants to rebut the charge. The court held that a claim under 1981 is for this purpose to be equated with a claim under the 14th Amendment and is thus, distinguishable from a Title VII claim which does not require a showing of intentional discrimination.

The court remanded the case with instructions that the District Court determine if the statistics established a prima facie case of discriminatory purpose.

NOTE: In Davis v. City of Los Angeles 566 F 2d 1334, the Court of Appeals for the 9th Circuit held that a plaintiff in a 1981 suit need not prove purposeful discrimination. The Supreme Court granted certiorari but declared the case moot and the 9th Circuit opinion to be of no precedential value 59 LEd 2d 642.

Court of Appeals - 5th Circuit
SOUTHBRIDGE PLASTICS DIVISION v. Local 759
565 F.2d 913 (1978)

FACTS: Plaintiff brought an action seeking a declaratory judgment that a conciliation agreement with EEOC, modifying provisions of the company's seniority plan and replacing them with a quota system, overrode any contradictory provisions contained in the collective bargaining agreement with the union. The District Court granted summary judgment.

ISSUE: Does the conciliation agreement or the seniority plan prevail under U.S. v. Teamsters.

DISCUSSION: The Court of Appeals, relying on the Supreme Court's decision in U.S. v. Teamsters, held that in the absence of a showing of discriminatory purpose in a seniority system, it is protected from attack on other Title VII grounds. The court, accordingly, struck down the conciliation agreement with EEOC insofar as it conflicted with the seniority system. The court declined to remand the case for a determination of the seniority rights of individual employees affected by post-Act discrimination, finding that an action for declaratory judgment could not be converted into a Title VII action. The decision of the District Court was reversed.

Court of Appeals - 5th Circuit
PEARCE v. WICHITA COUNTY
590 F. 2d 128 (1979)

FACTS: Plaintiff filed suit under the Equal Pay Act and the District Court awarded her damages.

ISSUE: Was the verdict proper under the Equal Pay Act?

DISCUSSION: Defendant contended on appeal that National League of Cities v. Usery, 429 US 833, precluded extension of the statute to the States. That case held that insofar as statutes extending Federal minimum wages to State employees operated to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted to Congress.

The Court of Appeals held that the Equal Pay Act effectuated different purposes than minimum wage laws and that National League of Cities was not controlling. Specifically, the court held that the EPA leaves the State free to set all substantive terms of employment provided that men and women receive equal pay for equal work. Unlike minimum wage laws, the EPA does not displace the states' freedom to structure the delivery of services or interfere with the employer-employee relationship. The freedom to pay female employees wages less than those paid to men for equal work is not among the functions essential to the separate and independent existence of the states.

Accordingly, the court held extension of the Equal Pay Act to the states is a valid exercise of Congressional power under the Commerce clause of the Constitution and is not barred by the Tenth Amendment.

Regarding the legal basis for the judgment for the plaintiff, the court held that a prima facie case under the Equal Pay Act requires a showing that the employer pays different wages to employees of opposite sexes for equal work on the job, the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions. The employee need not prove that the duties performed are identical but that the "skill, effort and responsibility" required are substantially equal.

The court found that"effort" is concerned with the measurement of the physical or mental exertion needed for the performance of a job. The plaintiff established that her male successor was paid substantially more than she had been although he assumed no additional duties. Finding that "skill" includes consideration of such factors as experience, training, education and ability, the court noted that plaintiff had far more experience than her male successor and an equal amount of ability. The court defined "responsibility" for Equal Pay Act purposes as the degree of accountability required in the performance of a job with emphasis on the importance of the job obligations. Actual duties rather than job titles are controlling. It was established that

plaintiff and her successor performed the same duties. The court found that plaintiff had met her initial burden of proof, and that the burden shifted to the defendant to prove that the unequal pay was due to one of the EPA's four exceptions:

- a seniority system;
- a merit system;
- a system which measures earnings by quantity or quality or production; or
- a differential based on any factor other than sex.

Defendant alleged that the wage differential between plaintiff and her successor was due to a "factor other than sex" namely, greater economic benefits from his work. The court found that although the increased revenue which plaintiff's successor earned might explain his raises during the course of his employment, it does not justify the large gap between plaintiff's final salary and his starting salary.

The court found the verdict for the plaintiff to be justified and affirmed.

Court of Appeals - 6th Circuit

AFRO AMERICAN PATROLMEN's LEAGUE v. DUCK

503 F. 2d 294 (1974)

FACTS: Plaintiffs brought this action under 42 U.S.C. 1981, 1983 and 42 U.S.C. 2000d; in addition they alleged violations of rights guranteed by the 13th and 14th Amendments. At issue was the City of Toledo's requirement that all police officers have five years of experience before becoming eligible for promotion to sergeant and two years additional service for each higher rank. Plaintiffs alleged that giving such a bonus for seniority was discrimination against blacks in promotion procedures. Plaintiffs had passed the written examination so the job-relatedness of the test was not an issue.

ISSUE: Are the employer's service requirements for promotion discriminatory?

DISCUSSION: The Court of Appeals noted that under 42 U.S.C. 1981, 1983, it is not necessary to prove that discrimination was willful or intentional. In the 5th and 8th Circuits, the court observed, statistics alone were sufficient to prove a prima facie case of discrimination. In this case, the court found that statistical evidence showing that only three black officers have been advanced to command positions was sufficient to support the conclusion that the time in grade requirement in the promotional system had the effect of perpetuating the effects of past discrimination. The court disagreed with the District Court determination that all in-service requirements be reduced to one year. The court remanded this issue to the District Court and instructed it to balance the respective interests to arrive at a more reasonable decision.

COURT OF APPEALS -6th CIRCUIT
MCDANIEL v. ESSEX INT'L INC.

571 F. 2d. 338 (1978)

FACTS: The employer entered into a collective bargining agreement with the union containing a union security clause which required union membership and payment of dues. The plaintiff, a Seventh Day Adventist, advised both the employer and the union that her religious convictions prevented her from complying with the clause. She requested an accommodation to her beliefs and suggested a contribution to a non-sectarian charity to be chosen by the employer and the union. Neither responded and she was discharged.

Plaintiff filed suit under Title VII and the U.S. Constitution seeking reinstatement, back pay, damages and injunctive relief. The defendant union asserted that Congress, in passing the Taft-Hartley Act which permitted the union shop, manifested its intent to subordinate competing interests including religious interests to achieve the goal of sharing the total costs of collective bargaining among all represented employees. The defendant argued that Title VII merely extends to employees in the private sector the identical protections against religious discrimination that the First Amendment extends to public employees.

The District Court, finding that plaintiff had failed to state a claim under Title VII, entered summary judgment for defendants. Noting that the religious accommodation provision (701(j) of Title VII) is subject to balancing against competing interests, the court found that the dues paying provision of Taft-Hartley is a tax in support of union collective bargaining efforts and represents a compelling governmental interest to which religious interests must be subordinated.

ISSUE: Did congress intend the provision which permits a collective bargaining agreement to require union membership as a condition of employment but prevent discharge for any other reason other than failure to pay dues to be an accommodation to religious scruples against union membership?

DISCUSSION: Citing TWA v. Hardison, the Court of Appeals held that section 701 (j) of Title VII requires that a reasonable accommodation be made or that the defendants show that to do so would cause undue hardship. The Court found that no such showing had been made in this case. In so ruling, the Court stated that there was no indication in the legislative history demonstrating that Congress had wished to subordinate 701 (j) to the Taft-Hartley Act. The Court opined that no national policy is of higher priority than the elimination of discrimination in employment and that accordingly, Taft-Hartley does not relieve an employer or a union of its duty of reasonable accommodation to an employee's religious beliefs.

The Court remanded the case to the District Court to determine if defendants' claim that reasonable accommodation would cause undue hardship (on appeal it was claimed that failure to discharge plaintiff would be a violation of the collective bargaining agreement) is persuasive.

Court of Appeals - 6th Circuit
BARKER v. TAFT BROADCASTING COMPANY
549 F.2d 400 (1977)

FACTS: Plaintiff was discharged because of his hair length. Women were permitted to wear their hair longer than men. The District Court dismissed plaintiff's action under Title VII for failure to state a claim.

ISSUE: Is an employer's grooming code which mandates a shorter hair length for men than for women a prima facie violation of Title VII?

DISCUSSION: The Court of Appeals noted in the first instance that there was no allegation that women employees who failed to comply with the rule concerning hair length were not discharged or that the employer hired women who were not in compliance with its grooming code. The Court found that such grooming codes bear such a negligible relation to the purposes of Title VII that it cannot be concluded that they were a target of the act. Accordingly, the District Court's ruling was affirmed.

The dissenter would interpret Griggs strictly, find a prima facie case based on neutral practices with impact on one sex and would require the employer to demonstrate a "bona fide occupational qualification" in order to escape Title VII liability.

Court of Appeals - 7th Circuit
HODGSON v. GREYHOUND LINES, INC.
499 F.2d 859 (1974)

FACTS: The Secretary of Labor filed a complaint alleging that defendant's maximum hiring age policy for applicants for the position of driver of intercity passenger buses violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621. The District Court found that plaintiff had made a prima facie case of age discrimination and held that defendant failed to satisfy its burden of proving that its age limitation policy was a bona fide occupational qualification reasonably necessary to the normal operation of its business.

ISSUE: Does a maximum age limitation for hiring intercity bus drivers violate the Age Discrimination in Employment Act?

DISCUSSION: The Court of Appeals reversed, holding that the maximum age limitation is a bona fide occupational qualification reasonably necessary to the normal operation of a passenger carriage service. The Court rejected the more stringent burden of proof imposed by the District Court and held that defendant, a business concerned not only with the safety of its employees but also with the safety of passengers and other motorists, must demonstrate only that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to the passengers. The Court added that only a minimum increase of risk of harm need be shown. Defendant satisfied this burden of proof with expert testimony as to the degenerative physical and sensory changes that occur in the aging process but which often go unnoticed, and with its evidence of the more rigorous and strenuous work that is required of employees with little seniority.

The court emphasized that it formulated a lighter burden of proof in this case in order to fit the peculiar nature of defendant's business as a bus company.

Court of Appeals -7th Circuit
YUHAS v. LIBBEY-OWENS-FORD CO.

562 F. 2d. 496 (1977)

FACTS: Plaintiff applied for a job at defendant's plant where her husband was already employed. The employer denied her application because of a rule that a present employee's spouse may not be hired in a similar capacity. The rule was directed solely at new employees whether male or female.

Plaintiff filed a class action suit on behalf of all similarly situated women alleging that the "no spouse" rule violated Title VII. Specifically she charged that the provision resulted in disparate impact against women inasmuch as 71 women as opposed to only 3 men had been denied employment as a result of its enforcement.

The District Court held that although the provision was sexually neutral on its face, its implementation fostered disparate impact and that therefore, plaintiff had established a prima facie case of discrimination. Defendant tried to show work relatedness in that the employment of spouses increased absence and lateness, created problems related to vacation and work schedule as well as morale problems resulting from the marital relationship. The District Court held that these arguments were insufficient to rebut the prima facie case of sex discrimination.

ISSUE: Does an employer's rule that a present employee's spouse may not be hired in a similar capacity violate Title VII?

DISCUSSION: The Court of Appeals agreed that a prima facie case of discrimination had been proved based on a showing of disparate impact. While conceding that there was a lack of statistical evidence regarding absenteeism and there was no evidence that productivity was enhanced by the rule, the court held that these facts did not "conclusively" demonstrate that the defendant's rule was not job related. The court found that the "no spouse" rule was predicated on the assumption that it is generally a bad idea to have both spouses working together and found this policy to be "plausible." The Court noted inter alia, that marital relationships often generate intense emotions which could interfere with workers job performance and that if one spouse became a supervisor, numerous problems of discipline and favoritism could arise. The Court found that while these reasons were not strictly related to productivity they were "far from frivolous" and the court found the argument that the rule improves the workplace to be convincing. The court stressed that Griggs and its progeny focused on personal characteristics which members of minority groups were not likely to possess, whereas that is not the case regarding the no spouse rule. Here the disparate impact resulted from the historical fact that in the past more men than women chose to work in defendant's plant.

Because of the plausibility of defendant's arguments and because the employer's rule did not penalize women on the basis of environmental or genetic background, the Court found it to be job-related and accordingly, reversed the District Court.

Court of Appeals - 7th Circuit
GAULT v. GARRISON
569 F.2d 993 (1977)

FACTS: Plaintiff filed an action on behalf of herself and other teachers under 42 USC 1983, challenging the constitutionality of governmental mandatory retirement requirements. She contended that the policy violated the Equal Protection Clause (by discriminating against plaintiffs on the basis of age), and the Due Process Clause (by creating an irrebuttable presumption and by terminating public employment arbitrarily).

The State statute which was challenged did not require the retirement of teachers at any age but provided for the termination of tenure at age 65 and that any subsequent employment be on an annual basis. The statute did not afford teachers over 65 the extensive procedures which a school board must follow to dismiss or review a teacher. The school board in question maintained a policy of forcing teachers who reached age 65 to retire at the end of the school year.

The District Court dismissed the suit.

ISSUE: Were the challenged statutes and policies unconstitutional?

DISCUSSION: The Court of Appeals noted that this case does not involve a claim of a right to government employment but rather concerns only the access to continued eligibility to such employment. The Court cited the Supreme Court decision of Massachusetts Board of Retirement v. Murgia, 427 US 307, which held that age does not constitute a suspect classification and that to defeat an Equal Protection claim the employer need only articulate a legitimate state interest to justify its policy and to show that its policy is rationally related to the furtherance of that State interest. The Court of Appeals, however, distinguished the holding for the defendant in the Murgia case which involved the forced retirement of policemen, noting that the imminent possibility of unfitness in that position which was shown to be related to advancing age and could become a matter of life or death is not analogous to the situation of a teacher. The court also found that the purpose of the requirement involved in this case was not clearly identified at the trial level. The court held that even if the purpose was to prevent the retention of unfit teachers as was hinted, no evidence was presented to indicate any relationship between the attainment of age 65 and unfitness to teach.

Regarding the lack of extensive procedures for teachers over 65, the court found the classification of teachers between those who are afforded and those who are not afforded procedural safeguards to be discriminatory on its face. The court vacated the District Court's order and remanded for further proceedings consistent with its opinion.

[CF. Vance v. Bradley, 59 LEd 2d 171, Supra]

Court of Appeals -7th Circuit
U.S. v. CITY OF CHICAGO
573 F.2d 416 (1978)

FACTS: The government brought an action to challenge promotion and transfer policies of the city's fire department alleging discrimination against blacks and Hispanics. In promoting employees, the city used a written examination, efficiency ratings, and seniority.

The District Court found that the methods employed resulted in adverse impact on blacks but that the methods were job related. Nevertheless, the Court ordered that the city 1) apply the EEOC Guidelines regarding efficiency ratings 2) furnish a validation study for promotions and conform to EEOC's selection guidelines and 3) post vacancies.

ISSUE: Were the defendant's procedures job related?

DISCUSSION: The Court of Appeals distinguishing the facts of Washington v. Davis which applied to cases brought under the Constitution and the facts of the case at hand, held that intent was not necessary to establish a violation of Title VII under the 1972 amendments applicable to State and local governments. The Court pointed out that the District Court failed to make a proper finding of fact as to whether a prima facie of discrimination had been established. Assuming that such a case had been established, the defendant asserted that its procedures regarding the 1973 examination for Captain were content valid. The Court however, found that the District Court had failed to make findings as to whether the examination tested "all or nearly all important parts of the job" as required by APA Standards. Opining that it was not enough that various functions of the Captain position class were tested, the Court held that there must be a correlation between the importance of the job function as determined by an analysis and the weight given to each function on the examination. Without this the Court found that a determination could not be made as to whether the exam was content valid.

Regarding the 1969 Engineer examination and the 1970 Lieutenant examinations, the defendant interposed a defense that they were criterion related i.e., that there was a correlation with identifiable criteria which indicated successful job performance. The record showed that the defendant had used 1) pre-existing efficiency ratings, 2) candidate efficiency ratings, and 3) ratings given in drill tests. The Court noted that these measures were not in accord with EEOC Guidelines which require a correlation between test scores and important elements "for which candidates are being evaluated." Here performance at the lower level was tested rather than for the job which was sought. The Court found that a correlation was required with post-promotion efficiency ratings.

In addition, the Court found no showing that drill test scores measure relevant aspects of job performance in the job sought and failed to predict performance. The Court held that the District Court, in finding job relatedness, while conceding non-compliance with the applicable EEOC Guidelines, did not give such non-compliance sufficient weight. The Court of Appeals held that the Guidelines are entitled to considerable deference as an administrative interpretation of Title VII and that compliance was generally required unless "cogent" reasons exist for non-compliance. EEOC's methods of validation were not the only ones which a court may recognize but the defendant'sburden would be much heavier if another method were employed. The Court held that on remand, the District Court must determine if this heavy burden of proof had been met and the defendant must make a strong showing that its criterion studies are predictive of successful performance in the jobs being tested for.

Regarding the efficiency ratings, the District Court held that statistical disparity without further explanation does not shift the burden to the defendant under Griggs if the efficiency component is job-related on its face. The Court of Appeals held that facial validity does not justify use of efficiency ratings. The Court remanded the case for a determination if the efficiency ratings employed accurately predicted performance in the job in issue.

Although the Court agreed with the trial Court that the small number of hispanics made a showing of discrimination almost impossible, it directed that hispanics can be included in a remedy designed to correct discrimination even if it cannot be shown that hispanics were victimized.

Court of Appeals - 7th Circuit
REDMOND v. GAF CORPORATION
574 F.2d 897 (1978)

FACTS: Plaintiff filed suit alleging inter alia, that he was discriminated against because of his religious practice when he was terminated. Specifically, he was charged by the elders of his religion to teach a religious class on Saturday, which conflicted with scheduled overtime. The District Court found that defendant had failed to show any effort to reasonably accommodate plaintiff's religious practices or that an effort to accommodate him would have caused the defendant inconvenience. Accordingly, the court entered judgment for the plaintiff.

ISSUE: What is meant by the term "religion" as used in Title VII?

DISCUSSION: The Court of Appeals noted that the 1972 amendments to Title VII defined "religion" as to include all aspects of religious observance and practice as well as belief. The court found that Title VII protection is not limited to Sabbatarian practices or practices which are specifically mandated or prohibited by a tenet of the plaintiff's religion. To restrict the terms of the act to those practices which are mandated or prohibited by a tenet of plaintiff's religion would involve the court in determining not only what are, in fact, the tenets of a particular religion but whether or not the practice in dispute is or is not required by the tenet. Such judicial determinations are irreconcilable with the warning of the Supreme Court that it is no business of the courts to say what is a religious practice or activity. The court concluded that conduct which is religiously motivated, i.e., all forms and aspects of religion, however eccentric, is protected.

The court disagreed with defendant's suggestion that because Saturday work per se is not prohibited by plaintiff's religion, the practices in question are not protected by Title VII. Plaintiff was sincere in his religious beliefs and the evidence showed that the time of the classes which plaintiff taught was arranged by the elders of his church. Therefore, the practices in question are within the protection of all aspects of religious observance and practice encompassed by Title VII. Inasmuch as the plaintiff proved a prima facie case of discrimination, and the District Court found that defendant had not made any effort to accommodate the plaintiff, its judgment was affirmed.

Court of Appeals - 7th Circuit

EICHMAN v. INDIANA STATE UNIVERSITY BOARD OF TRUSTEES

597 F.2d 1104 (1979)

FACTS: Plaintiff, a university faculty member who was not reappointed, filed suit alleging violations of Title VII and deprivation of his constitutional right of free speech inter alia. Plaintiff specifically contended under Title VII that he was discharged because he had actively participated in assisting a fellow faculty member who had asserted her Title VII rights.

The District Court granted defendant's motion for summary judgment. Regarding Title VII, the court held that plaintiff was not a member of a minority, that the actions taken against him were not racial or sexual in nature, and that he had not filed a charge with EEOC in the first instance as was required. Regarding free speech, the District Court held that plaintiff's interdepartmental memoranda which were considered in his termination did not constitute public speech and were therefore not constitutionally protected.

ISSUE: (1) Did defendant violate section 704 of Title VII? (2) Was plaintiff's complaint under Title VII outside of the jurisdiction of the District Court because of his failure to exhaust his administrative remedies? (3) Were plaintiff's first amendment rights abridged?

DISCUSSION: The Court of Appeals held that Title VII (section 704) clearly extends protection to all who assist or participate in a Title VII matter regardless of race or sex. Plaintiff was trying to assist a fellow employee who had filed a complaint with EEOC and had alleged that he had been discharged because of this. Further, Title VII does not require that as a prerequisite to suit an individual alleging discrimination must first file a complaint with EEOC. Rather, the statute speaks of a charge filed "by or on behalf of" a person claiming to be aggrieved. Since plaintiff was named as a person aggrieved in the charge of yet another faculty member claiming retaliation for assisting in his colleague's Title VII action, plaintiff has met the jurisdictional prerequisite for filing in District Court.

Regarding plaintiff's free speech allegation, the court, taking note of Givhan, held that private complaints were protected by the 1st Amendment. The court remanded this allegation to the District Court for a determination of whether this was actually the cause of his dismissal and remanded the Title VII allegation for further proceedings.

Court of Appeals - 7th Circuit
DAVIS v. WEIDNER
596 F.2d 726 (1979)

FACTS: Plaintiff, a non-tenured instructor at a university, filed suit alleging sex discrimination under Title VII in the termination of her teaching position. After her annual retention review by the senior faculty, her department decided not to retain her. Plaintiff appealed through university channels and subsequently filed suit.

The District Court dismissed plaintiff's complaint stating that McDonnell Douglas v. Green did not apply because this was a nonretention case and not a failure to hire case.

ISSUE: What is the proper burden of proof? Was plaintiff the victim of discrimination?

DISCUSSION: The Court of Appeals found that the District Court's distinction regarding the applicability of McDonnell Douglas had no merit, in that the Supreme Court has applied it to discharge cases. Nevertheless, the defendant argued that in the facts of this case an additional requirement should be added to the McDonnell Douglas four-part standard for proving a prima facie case of discrimination, namely, that plaintiff's rejection did not result from a relative lack of qualifications. The court rejected this stating that it is more sensible to require the employer, in his rebuttal, to offer his justification for his employment decision than to force the plaintiff to to refute hypothetical reasons why the employer might have found her relatively less qualified. Establishment of a prima facie case under McDonnell Douglas does not constitute an ultimate finding of fact -- it is merely a model for ordering and evaluating evidence concerning employment discrimination. Because plaintiff proved that she was a woman qualified for her position whose employment was terminated and that subsequently, a male colleague was retained in the same position, she has proved a prima facie case.

Nevertheless, this showing was rebutted by legitimate, nondiscriminatory reasons for plaintiff's nonretention, that is, budgetary constraints, low enrollment and oversupply of teachers in her field. A critical factor in plaintiff's nonretention, the court found, was her aversion to teaching in a particular type of program which had high enrollment, administrative support and separate budgeting. Finding no pretext, the Court of Appeals affirmed the District Court's judgment of no discrimination.

Court of Appeals - 7th Circuit
TRAFALET v. THOMPSON
19 FEP 418 (1979)

FACTS: Plaintiff filed suit challenging the constitutionality of the Illinois Compulsory Retirement of Judges Act under which a judge is automatically retired after the general election following his 70th birthday. The District Court entered judgment for the defendant.

The plaintiff specifically alleged that the statute violated the Equal Protection Clause of the 14th Amendment by creating distinctions not rationally related to the stated purpose of the act and by creating an irrebuttable presumption.

ISSUE: Does the statute violate the Equal Protection Clause?

DISCUSSION: Citing Massachusetts Board of Retirement v. Murgia, 427 US 307, and noting that age is not a suspect classification for Equal Protection purposes, the Court of Appeals agreed that the applicable standard is whether the challenged classification is rationally related to a proper legislative purpose. The court also noted that neither the right of government employment nor the right to run for elective office is fundamental.

Nevertheless, the plaintiff asserted that under Murgia, the court may only consider those legislative purposes articulated by the statute in determining whether a rational purpose exists. The court, however, quoted the Supreme Court's language in Vance v. Bradley that "in an Equal Protection case of this type... those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived true by the governmental decisionmaker" and therefore, is not limited to the legislative purposes articulated by the statute. The court quoted the statement of the Illinois Legislative Council that "... a mandatory retirement at age 70 will tend to insure a more vigorous judiciary..." and found that this basis was not irrational because it was not used for other State offices. The court held that the legislature could rationally have justified treating judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode. The court cited evidence at the trial which demonstrated an association between aging and diminution of intellectual faculties. The court concluded that the fact that there are other methods for evaluating performance does not render this system unconstitutional.

Regarding plaintiff's claim that an irrebuttable presumption had been established, the court held that the weight of the case law treated the concept as coextensive with Equal Protection. Accordingly, if a statutory classification is not suspect, its policy is rationally related to a legitimate state purpose and thus satisfies Equal Protection requirements, it does not create an irrebuttable presumption.

The Court affirmed the judgment of the District Court.

Court of Appeals - 7th Circuit
TAYLOR v. PHILIPS INDUSTRIES
19 FEP 177 (1979)

FACTS: Plaintiff, a woman, was employed as a warehouse foreman and performed substantially the same work that had been done by the man who preceded her in the position. Plaintiff, however, earned a considerably lower salary. Subsequently, after returning from a period of extended sick leave, plaintiff was discharged and a man was hired to replace her. He was paid a higher salary than plaintiff for performing the same duties although there was no evidence that he was more qualified than plaintiff or had any more seniority. There was evidence that several male employees, including plaintiff's successor, had taken extended medical leave without being replaced.

Plaintiff filed suit under Title VII alleging that she was unlawfully discriminated against regarding wages and was ultimately discharged because of her sex. The District Court agreed and awarded damages.

ISSUE: 1) Was a violation of Title VII proved in this case?
2) Was the District Court's remedial relief appropriate?

DISCUSSION: The Court of Appeals found that under the standards set forth by the Supreme Court in Furnco v. Waters, plaintiff had met the initial burden of establishing a prima facie case of disparate treatment by furnishing evidence of a wage differential based on sex as well as evidence showing that she had performed her job better than her male predecessor or successor. The court did not credit defendant's attempt to prove that plaintiff's dismissal was legitimately based on her extended use of sick leave inasmuch as males who had taken similar leaves of absence had not been discharged. Having rejected all allegedly legitimate reasons proferred for the discharge, the court, citing Furnco, concluded that it is more likely than not that defendant's decision was based on impermissible considerations, namely, plaintiff's sex.

The court held that a plaintiff's damages are determined by measuring the difference between actual earnings for the period in question and those which she would have earned but for the discrimination. Here, plaintiff established economic loss due to her lower salary but the evidence does not establish loss of income as a result of her discharge since it is not clear how much she earned after leaving defendant's employ.

Accordingly, the court affirmed the findings of sex discrimination but remanded the case for clarification of the basis for assessing damages.

Court of Appeals - 8th Circuit
CARTER v. GALLAGHER
452 F.2d 315 (1972)

FACTS: Plaintiffs instituted this class action suit on behalf of minority groups seeking injunctive relief from alleged discriminatory hiring practices of the fire department of the City of Minneapolis under 42 U.S.C. 1981, 1983. The District Court had granted relief to the plaintiffs, which included awarding absolute preference to minorities until 20 such persons were hired. Defendant appealed on the grounds that substantial evidence was lacking to support a finding of discrimination, the Court deprived the City civil service commission of its discretionary power under local law, and the Court erred in granting absolute minority preference in hiring.

ISSUE: (1) Did plaintiffs establish a prima facie case of discrimination? (2) Was the lower Court justified in awarding an absolute minority preference in hiring?

DISCUSSION: The Court of Appeals found that the evidence shows that there were no minority firefighters in the 535 member department which is located in a city with a 6.44 percent minority population. The court concluded that this is sufficient to establish plaintiff's prima facie case that defendant's hiring practices are discriminatory. Although plaintiff did not prove a discriminatory intent, such proof is not a requirement under 42 U.S.C. 1981, 1983.

The Court of Appeals panel concluded that an absolute preference for minorities violates the Constitution and the intent of Title VII of the Civil Rights Act of 1964. The court held that 1981 proscribes any discrimination in employment based on race even though a defendant may have been guilty of overt discrimination in the past. Solutions for minorities who were the objects of past discrimination are found in objective hiring procedures.

The Court of Appeals sitting en banc reversed in part the panel's conclusion. Noting that an absolute preference violates the constitutional rights of qualified white applicants, the Court decided that in order to eradicate the effects of past discrimination, a court has the power to order affirmative action. Therefore, a court has the power to order the hiring of 20 qualified minorities as long as this does not deny the constitutional rights of others. In light of the circumstances of the case, the Court of Appeals ordered that minority persons be hired on a 1 to 2 ratio until 20 qualified minority persons are hired.

Court of Appeals - 8th Circuit

GREEN v. MISSOURI PACIFIC RAILROAD COMPANY

523 F.2d 1290 (1975)

FACTS: Plaintiff applied for employment as a clerk at defendant's main office in 1970. He was later informed that he could not be employed because he had been convicted and served 21 months in prison for refusing military induction. Defendant's policy is not to hire anyone convicted of crimes other than minor traffic offenses. In fact, prior to 1972, defendant also investigated arrest records, but halted that practice after the decision in Gregory v. Litton Systems, Inc., 472 F.2d 631 (CA 9 1972).

ISSUE: Is defendant's refusal to hire anyone with conviction records discrimination against blacks in violation of Title VII of the Civil Rights Act of 1964?

DISCUSSION: Overturning the District Court decision, the Court of Appeals found that plaintiff established a prima facie case by showing statistically that defendant's policy resulted in a rejection rate for blacks two and one-half times that of whites. Even though an employment practice in question is facially neutral, if plaintiff establishes a prima facie case by proving a disproportionate impact on minorities, the burden of coming forth with additional evidence shifts to the employer.

The court held that defendant failed to justify its employment practice of an absolute disqualification for a conviction record as a business necessity. Rather than basing an employment decision on past conduct that may be so remote in time and have little significance in relation to particular job requirements, conviction records should be judged on an individual basis in order to determine whether qualilfication is justified.

Court of Appeals - 8th Circuit
MEYER v. MISSOURI STATE HIGHWAY COMMISSION
567 F.2d 804 (1977)

FACTS: Plaintiff, a toll collector, brought an action under Title VII alleging that her employer discriminated against her because of sex in failing to promote her and in failing to consider her for relocation to another job when her job terminated. Her suit was predicated on a disparate treatment theory under McDonnell Douglas v. Green. The District Court entered judgment for the defendant.

ISSUE: Did the District Court properly evaluate the evidence under the test set forth in McDonnell Douglas v. Green?

DISCUSSION: The Court of Appeals held that promotion and job relocation are sufficiently analogous to selection to permit use of the four part McDonnell Douglas test for proving a prima facie case of discrimination.

Regarding the issue of promotion, the court upheld as not clearly erroneous the District Court's findings that plaintiff was not promoted because she lacked the respect of her co-workers and did not respond adequately in an emergency.

Regarding the issue of relocation, the District Court had found that complainant had no prior experience with handling light equipment and that on her application she had expressed a preference for daytime working hours. Inasmuch as the job to which plaintiff wished to be relocated involved night hours and experience with such equipment, the District Court found no discrimination.

The Court of Appeals stated that the application form called only for general information and that plaintiff's preference for daytime hours was just that and did not exclude working night hours. Plaintiff was not required to prove, as the District Court maintained, that the defendant did not look at her application objectively since only disparate treatment must be shown. The court also made reference to statistical evidence that 159 men but no women were relocated to the kind of position that plaintiff sought and that 10 of 15 men from her prior job location were interviewed, and that some of them had less evident qualifications than plaintiff. Finding that the defendant only offered rebuttal evidence on the issue of qualification, the court found that the defendant did not carry its burden. Accordingly, the Court of Appeals (2-1) reversed the District Court on this issue.

COURT OF APPEALS -8th CIRCUIT
MOSBY v. WEBSTER COLLEGE

563 F. 2d 901 (1977)

FACTS: Plaintiff, a black, brought an action under 42 USC 1981 and Title VII alleging that her employer discriminated against her on the basis of race by declining to renew her teaching contract and in refusing to promote her to the position of full professor. The college denied her promotion because her teaching performance was less than extraordinary (this was a requirement for a promotion to the position of full professor). She was subsequently evaluated for contract renewal and based on negative recommendations of the department head and the undergraduate dean, her contract was not renewed. At trial, plaintiff tried to show that her termination was handled differently by the college than those of whites and introduced statistical evidence designed to show racially discriminatory animus.

The District Court entered judgment for the defendant holding that a valid, non-discriminatory reason had been set forth.

ISSUE: Did the District Court err in not addressing the matter of prima facie cases in concluding that the evidence, taken as a whole, showed the college actions to have been non-discriminatory?

DISCUSSION: The Court of Appeals held that in a Title VII action the defendant may either 1) refute the existence of a prima facie case by showing that the facts upon which the inference of discrimination is predicated are non-existent or 2) may show a legitimate reason, thus rebutting the inference of discrimination. In the event that the defendant carries his burden, the plaintiff must be allowed to show that the defendant's actions were pretextual in nature. The District Court relied on defendant's demonstration of a legitimate, non-discriminatory excuse for its actions in rendering its judgment. The Court of Appeals agreed that the reasons set forth by the college (negative statements by students, refusal to accept advisees, unwillingness to teach special education courses inter alia) constituted good cause for dismissal and that the college's actions had not been shown to be pretextual. In view of this, the Court found it unncessary to decide the issue prima facie case inasmuch as its existence can be assumed for purposes of deciding the case. Accordingly, the judgment of the District Court was affirmed.

Court of Appeals -8th Circuit
HUSTON v. AUTO WORKERS LOCAL 93
559 F. 2d 477 (1977)

FACTS: Plaintiff was an assembly line employee and was a member of defendant union. While employed at the plant, plaintiff joined a church which prohibited its members from working sundown Friday until sundown on Saturday. Plaintiff began observing this tenet. There were two shifts at the plant, the second of which extended into nighttime hours. Shift preference as enunciated in the collective bargaining agreement was based on seniority and the second shift was preferred by fewer employees. Plaintiff did not have enough seniority to choose the daytime shift and absented himself from work on Friday evenings to the extent that working hours conflicted with his Sabbath observance.

Plaintiff was discharged and filed a grievance with the union which was disposed of when the company and the union agreed to clear plaintiffs record if there were no further violations in six months. The company, on its own initiative, assigned plaintiff to the first shift but employee complaints caused the union to request that he be assigned to the second shift. When the company acceded to the union's demand, plaintiff persisted in being absent during Sabbath hours and was ultimately discharged.

Plaintiff filed suit against the union alleging that the company had accommodated his religious beliefs but that the union had interfered to his detriment.

The District Court granted judgment to the defendant.

ISSUE: Were the union's actions in this case unlawful?

DISCUSSION: The Court of Appeals held that both the union and management had made attempts to accommodate plaintiff's religious beliefs. "Given the postulate of a seniority system, a statutory obligation to accommodate religious needs does not supercede the contractual seniority rights of other employees." The court found no evidence of discrimination in that plaintiff was afforded the same rights as other employees regarding shift preference. The employer could not take steps to accommodate him without violating the collective bargaining agreement. Citing TWA v. Hardison, the court held that to grant plaintiff a preference would be tantamount to reducing the right of other employees who did not share plaintiff's religious beliefs. The court found that it would be anomolous to require a union to do that which under Hardison is not required of an employer. The Court of Appeals accordingly affirmed the judgment of the District Court.

Court of Appeals - 8th Circuit
BOYD v. OZARK AIRLINES
568 F.2d 50 (1977)

FACTS: Plaintiff filed suit under Title VII challenging defendant's 5'7" minimum height requirement for pilots as discriminatory. The District Court found that plaintiff had established a prima facie case of sex discrimination based on statistics showing disparate impact, but that defendant had established business necessity.

ISSUE: Was plaintiff's prima facie case of discrimination rebutted?

DISCUSSION: The Court of Appeals found that the evidence demonstrated that an individual's capacity to operate all of the instruments in the cockpit and reach the design eye reference point is dependent upon an individual's height and is essential to the safe and efficient operation of an airplane. Plaintiff argued that a minimum height requirement had not been sufficiently validated in accord with EEOC's Guidelines. The court responded that when a job clearly requires a higher degree of skills and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a lighter burden to show that his employment criteria are job related. The judgment of the District Court was affirmed.

Court of Appeals - 8th Circuit
FIREFIGHTERS INSTITUTE v. CITY OF ST. LOUIS
588 F.2d 235 (1978)

FACTS: Plaintiffs alleged racial discrimination against blacks under 42 USC 1981, 1983 and Title VII in the hiring and promotion of personnel in the Fire Department and challenged the existence of racially segregated eating arrangements in the firehouses. The District Court found that the examination used for the entry level position firefighter had disparate impact on blacks and was not validated. The court ordered the defendant to attempt to achieve a 50 percent hiring ratio of blacks for the next 5 years. In all other respects the court entered judgment for the defendants. Neither party appealed regarding the firefighter examination but did appeal from the decision insofar as it concerned promotional examinations and maintenance of segregated eating facilities.

The Court of Appeals found that the examination used for promotion to the position class of Fire Captain had a disparate impact on blacks and was not sufficiently job related to justify its use. The court remanded the case with directions that the District Court maintain jurisdiction until a valid examination is devised and approved by the court. The Court of Appeals also found that the maintenance of segregated eating facilities in the firehouse violated Title VII.

Upon remand, the District Court permanently enjoined the use of the captain's examination results and enjoined the defendant from making any permanent appointments to the position class of captain, unless made on the basis of a valid examination, unless 50 percent of such vacancies were filled by qualified blacks. Blacks who had passed the invalid test were to be deemed qualified. The defendant was directed to promulgate regulations to prohibit segregated eating facilities.

Disappointed with the intransigence of all parties in carrying out its directives, the District Court subsequently rescinded its order and substituted a decree requiring formulation of a racially identified list of firefighters who have served for more than five years in that capacity. The black firefighters with the most seniority were to be offered the opportunity to be evaluated by a technique which uses individual and group exercises to simulate job responsibilities while assessors rate a candidate's performance. The candidate receiving the higher score was to be promoted regardless of race. The one not promoted was to compete with the black and white candidates with the next highest seniority and so on.

ISSUE: Was the District Court's remedial relief proper?

DISCUSSION: Plaintiff argued on appeal that the action was inadequate in that the order failed to guarantee the promotion of any blacks and requested imposition of a 50 percent racial promotional goal as set forth in the District Court's initial decree. The Court of Appeals noted that in Bakke, the Supreme Court approved of the use of racial preference as a means of remedying constitutional or statutory violations resulting in identified race based injuries to individuals held entitled to the preference. The court rejected the defendant's contention that preferential treatment is unavailable because there is no evidence that any specific black candidate would have been promoted but for the invalid test, citing Teamsters and Franks. Although District Courts have broad equitable power to fashion relief, they have the duty to render a decree which will so far as possible eliminate the effects of discrimination. The court, finding that reinstatement of the District Court's decree encompassing a 50 percent racial goal was insufficient, ordered the immediate promotion of those black firefighters who were clearly qualified. The District Court in its discretion was also permitted to promote the white firefighters who were qualified. Additional promotions should be made using the "assessor" technique outlined in the District Court's second decree. Assignments to acting captain positions must reflect a 50 percent black ratio pending development of a valid examination.

Recognizing that the affirmative relief ordered may impinge on the justified expectations of both black and white firefighters who are as well qualified as those whose promotions were ordered, the court noted that continuing inaction will serve neither to vindicate the rights of those black firefighters victimized by discrimination nor give the public the fire protection they deserve.

The case was remanded to the District Court for further proceedings as outlined above.

Court of Appeals - 8th Circuit
EEOC v. CONTOUR CHAIR LOUNGE
596 F.2d 809 (1979)

FACTS: EEOC sought enforcement of a conciliation agreement undertaken with defendant following investigation of a complaint of discrimination by an employee. Defendant filed a counterclaim seeking an adjudication that the conciliation agreement was unenforceable as involving reverse discrimination. The agreement in question provided that defendant would hire one black for every white appointee during the life of the agreement, and to use its best efforts to increase black employment in job classifications in which blacks had not been assigned or where they were statistically underrepresented. In entering the agreement, the parties stipulated that in signing the agreement, defendant did not admit that it had been guilty of prohibited discrimination.

ISSUE: Is the conciliation agreement enforceable?

DISCUSSION: The court held that the power of the District Courts to order affirmative action in Title VII suits was broadened substantially when Congress adopted the Equal Employment Opportunity Act of 1972. Since the passage of that Act, affirmative action programs mandated by the District Courts have at times required that preferential treatment be awarded to members of minority groups. Such programs, which often involve quotas, have not only been ordered by the courts but have been agreed upon voluntarily. In view of the uncertainty of the quota issue due to the pendancy of Weber before the Supreme Court, the court declined to hold such programs unconstitutional or illegal per se and adhered to its established position that such programs are valid at least where actual racial discrimination in an employment situation has been shown.

In this case, the agreement was entered into after (1) a complaint of discrimination was made to EEOC by an employee; (2) an investigation by EEOC had found reasonable cause to believe that the complaining party had been subjected to racial discrimination; 3) underlying findings that to some extent blacks as a class had been discriminated against had been made; and (4) later negotiations between EEOC and defendant had taken place. Had defendant refused to enter into the agreement, suit might have been filed empowering the District Court to order affirmative action if the facts so warranted. In the circumstances of this case, the court held that the conciliation agreement was enforceable.

Court of Appeals -8th Circuit
WREN v. T.I.M.E. - D.C. INC.
595 F.2d 441 (1979)

FACTS: Plaintiff was an employee of a trucking firm which was subject to a union contract incorporating a seniority system. Under the system, drivers, according to their seniority, were entitled to bid for set schedule runs which entailed inter alia regular days off. Those who were unable to secure schedule runs were placed on the "extra board" which meant that they had to be available for call twice daily. The extra board was also subject to seniority and those drivers with most seniority were called first and were permitted to decline the run but only if no driver with less seniority were available. A driver was permitted to decline a run for sickness, overwork (more than 70 hours of driving in 8 days), or excused absences secured in advance.

Plaintiff joined a religious group under whose tenets work was not permitted from sundown Friday until sundown Saturday. Plaintiff drove on the Sabbath on rare occasions when that was required. However, to cure the company's financial problems, management reduced the number of drivers, resulting in plaintiff's being asked to drive on his Sabbath more frequently. Plaintiff asked to be excused during these periods and the company responded that failure to drive a shift would lead to disciplinary action, including discharge. Plaintiff avoided Sabbath work by scheduling doctor appointments, and calling in sick, among other things. He was initially warned about these actions and was subsequently discharged. He then filed suit under Title VII alleging religious discrimination.

ISSUE: Did the employer make sufficient efforts to accommodate plaintiff's religious beliefs?

DISCUSSION: The Court of Appeals held that although the company did not bend over backwards to accommodate the plaintiff, it was not required to bear more than de minimus cost in effecting an accommodation. Such costs would include contribution to insurance and pension funds and costs of locating replacement drivers as well as costs resulting from delays and cancellations of runs when replacement drivers were not timely available. Further, the court found that to accommodate plaintiff would deprive the other employees of their contractual seniority rights. The holding of the District Court was, accordingly, affirmed.

Court of Appeals - 9th Circuit
FOUNTAIN v. SAFEWAY STORES
555 F.2d 753 (1977)

FACTS: Plaintiff was discharged for failure to wear a tie at work. He filed suit alleging that defendant's action constituted sex discrimination under Title VII. The record showed that previously, female employees wore pants instead of skirts in violation of the applicable dress code. Defendant amended its regulations to reflect the women's preference without imposing sanctions. Further plaintiff had previously protested a regulation requiring haircuts to be above the collar and defendant modified its code to accommodate plaintiff's preference.

The District Court rendered summary judgment for defendants.

ISSUE: Did the defendant's conduct constitute sex discrimination under Title VII.

DISCUSSION: The Court of Appeals found that under Title VII, regulations which require male employees to conform to different grooming standards than female employees is not sex discrimination within the meaning of Title VII. Responding to plaintiff's argument that even if this is the case, the unequal enforcement of different dress codes does violate Title VII, the court found that plaintiff's own experience regarding hair length proved otherwise.

The court continued that once it is concluded that defendant can promulgate different regulations for the two sexes it follows that it may modify them in accord with its judgment regarding desirable dress and grooming standards. The power to amend regulations for one sex independent of any action regarding the regulation concerning the other sex flows directly from the employer's power to promulgate dress regulations that were not overly burdensome yet served to extend a beneficial image of the company.

Court of Appeals - 9th Circuit
HOLLOWAY v. ARTHUR ANDERSEN & COMPANY
566 F.2d. 659 (1977)

FACTS: Plaintiff, a transsexual, filed suit claiming that defendant discriminated against her because of her sex in discharging her and thus, violated Title VII. The District Court dismissed the claim for lack of subject matter jurisdiction in that Title VII does not embrace transsexual discrimination.

ISSUE: Is discrimination because of transsexuality covered by Title VII?

DISCUSSION: Plaintiff contended on appeal that "sex" is synonomous with "gender" and that the latter encompasses transsexuals. Defendant claimed that the term "sex" should be given its traditional definition. The court found that the clear intent of Title VII was to remedy the economic disparities of women as a class. The cases interpreting Title VII sex discrimination agree that it was intended to place women on an equal footing with men. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination because of "sexual preference" but none have been passed. Accordingly, the court concluded that the prohibitions against sex discrimination contained in Title VII do not encompass transsexuals.

The plaintiff also argued that if this restrictive interpretation on Title VII were to be applied, it would raise Equal Protection problems. The court found this argument to be without merit in that transsexuals are not necessarily a "discrete and insular minority" nor is transsexuality an immutable characteristic determined solely by the accident of birth". The very complexity involved in defining the term would prevent a determination that they comprise a suspect class. Therefore, the rational relationship test must be applied to the provisions of Title VII and it can be said without question that the prohibition of employment discrimination between males and females is rationally related to a legitimate governmental interest.

The dissenting justice found the plaintiff's allegation that she was discharged for having become a female under controversial circumstances states a claim under Title VII.

Court of Appeals - 9th Circuit
BRYANT v. CALIFORNIA BREWERS ASSOCIATION
585 F.2d 421 (1978) Certiorari granted

FACTS: Plaintiff challenged a 20 year old collective bargaining provision which defined a permanent employee as a worker employed for at least 45 weeks in one calendar year which he alleged had the effect of creating an all white class of permanent employees (no black had ever attained permanent status). The District Court dismissed the allegation.

ISSUE: Is the challenged provision immunized by 703(h) of Title VII?

DISCUSSION: The Court of Appeals (2-1) found the provision to be innocuous on its face and noted that due to circumstances obtaining in the industry, the demand for labor is less and as a result, it is now virtually impossible for any temporary worker, white or black, to work 45 weeks in one year. In Teamsters, the Supreme Court held that a bona fide seniority system which applies equally to all workers and is free from intent to discriminate, is immunized under 703(h) even though it perpetuates the effects of discrimination. The court however found that the provision in question was not properly perceived to be part of a seniority system as correctly defined because it lacked the fundamental component of such a system namely, that employment rights should increase as the employee's length of service increases. Here, junior employees may acquire greater benefits in that the provision does not concern total time worked or overall length of employment. The court held that the challenged provision merely constituted a classification device defining temporary and permanent employment. Accordingly, the court concluded that the provision did not fall within the protection of 703(h), that the Griggs test applied, and therefore, that there was no requirement to prove discriminatory intent. The case was remanded to the District Court.

Court of Appeals - 9th Circuit

BURNS v. SOUTHERN PACIFIC TRANSPORTATION CO.

589 F. 2d 403 (1978)

FACTS: Plaintiff filed suit under Title VII to enjoin defendants from discharging him for his refusal to pay union dues which he claimed was in violation of his sincerely held religious beliefs. The District Court held that the company and union had fulfilled their duties of accommodation when they offered to release plaintiff from his obligation to belong to the union. It found that payment of the dues equivalent to a charity worked an undue hardship on the union.

ISSUE: Did the defendants make a sufficient effort to accommodate plaintiff's religious beliefs and would payment of the amount of union dues to a charity work an undue hardship on defendants?

DISCUSSION: The Court of Appeals held that plaintiff fully met his burden of proving a prima facie case of religious discrimination in violation of Title VII by proving that he had a bona fide belief that union membership and the payment of union dues were contrary to the teachings of his religion. When he informed the employer and the union of this, the burden shifted to them to prove that they had made good faith efforts to accommodate his beliefs and that they could not reasonably do so without incurring undue hardships.

The court found that in TWA v. Hardison, the Supreme Court did not define the degree of accommodation required of an employer but that Title VII requires "some form of accommodation". Regarding undue hardship, the Hardison decision found that the employee had demonstrated undue hardship where the accommodation requested by the employee would have effectively required preferential treatment on the basis of plaintiff's religion causing sacrifices in the work schedule of other employees. The Supreme Court held that where the costs are greater than de minimus, undue hardship is demonstrated.

The Court of Appeals held that in this case, defendants made no effort to accommodate plaintiff but foisted upon him the terms of the existing contract which freed him from union membership if he paid the dues. The court rejected the defendants' view that substitution of payments to a charity works an undue hardship as a matter of law. In this case, defendant did not demonstrate that there was sentiment against "free riders", i.e., those who reap the benefits of union activity but who do not bear part of the cost. Undue hardship requires more than proof of some fellow worker's complaints about a particular accommodation. Proof of imposition on co-workers or disruption of the work routine is required. The court rejected the defendants' argument that substantial financial hardship would result from exempting plaintiff from paying dues. The court found that as a result of this accommodation, the other union members would have to pay an additional 2 cents a month and that this constituted de minimus loss. There is no validity to the speculation that the accommodation would cause large numbers of employees to demand similar exemption in that the record showed that only 3 employees shared plaintiff's faith. The judgment of the District Court was reversed.

Court of Appeals - 9th Circuit
SIAS v. CITY DEMONSTRATION AGENCY
588 F.2d 692 (1978)

FACTS: Plaintiff filed suit alleging that his discharge resulting from his having urged his employer to hire more Mexican-American employees, violated Title VII. The District Court found that his discharge was due to retaliation for his opposition to alleged acts of discrimination and violated Title VII but denied reinstatement and full back pay. Plaintiff appealed and defendant cross-appealed contending that in the absence of a finding of discrimination, it was improper for the District Court to find a violation of Title VII.

ISSUE: Is an employee protected from retaliation under 704(a) of Title VII regardless of the merits of his original charge of discrimination?

DISCUSSION: The Court of Appeals found that the "participation clause" of Title VII (concerning employees who participate in an investigation under Title VII, 704(a)) shielded an employee from retaliation regardless of the merits of his charge of discrimination with the EEOC, noting that the purpose of the clause is to protect employees who utilize the tools provided by Congress to protect his rights. If the availability of that protection were to turn on ultimate success, resort to that remedy would be severely chilled.

The court found the "opposition" clause (protecting employees who oppose unlawful employment practices under Title VII) could be interpreted to apply only to cases where the employer had in fact, engaged in an unlawful practice but concluded that this too would have a chilling effect and further would encourage employees to file formal charges rather than to seek informal conciliation. Accordingly, the court held that where the employee had a reasonable belief that discrimination existed, opposition is protected, even if the employee turns out to be mistaken as to the actual factual situation. The court affirmed the finding of retaliation.

Regarding relief, the court conceded that the granting of back pay is within the discretion of the trial court. However, given a finding of unlawful discrimination, it should be denied only for reasons wich would not frustrate the central statutory purposes of eradicating discrimination. While the doctrine of mitigation of damages is applicable to Title VII relief, the burden of proving a failure to mitigate damages is on the defendant. In carrying his burden he must show that (1) the damage could have been avoided because there were suitable positions available which plaintiff could have discovered and 2) that plaintiff failed to use reasonable care and diligence in seeking such a position. The court remanded to the District Court to apply this standard to the issue of remedial relief.

Court of Appeals - 9th Circuit
U.S. v. LOS ANGELES
19 FEP 1455 (1979)

FACTS: The United States filed suit under Title VII, the Revenue Sharing Act, (31 USC 1242) and the Safe Streets Act, alleging that the Los Angeles Police Department (LAPD) engaged in a pattern and practice of employment discrimination against blacks, women, and Spanish-surnamed persons. The District Court enjoined the U.S. from pursuing any administrative action or investigation regarding employment discrimination by LAPD, from terminating any funds, and from failing to grant any request by the city for Federal funds because of allegations of employment discrimination.

ISSUE: Did the defendant meet minimum standards for obtaining injunctive relief?

DISCUSSION: The Court of Appeals noted that the Safe Streets Act requires the Law Enforcement Assistance Administration (LEAA) to suspend payment of funds for discriminatory conduct unless the District Court correctly grants preliminary relief. The defendant contended that an injunction was required in that the Act (42 USC 3766(b)) provides that LEAA is not authorized to "deny or discontinue a grant" because of refusal to adopt "a percentage, ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency." Relying on the fact that suit was filed only after LAPD had refused to adopt a voluntary compliance agreement setting goals and timetables for increasing percentages of blacks, women, and Spanish-surnamed people, the defendant contended that its refusal to adopt a quota system precipitated this litigation.

The court held that even if it assumed arguendo that the goals and timetables constitute a quota system, it was not a system prohibited by the Safe Streets Act because there is not evidence that the system was part of a "program to achieve racial balance" within the meaning of the statute. The court held that the phrase "program to achieve racial balance" is a term of art referring to attempts to remedy racial disparities that were not produced by discrimination. A quota system directed towards altering gender based discrimination is obviously outside the purview of efforts "to achieve racial balance." More importantly, there is nothing in the record to suggest that the Federal government sought to remedy racial disparity not created by unlawful discrimination. The suspension of LEAA funds was the result of a breakdown in negotiations precipitated by the defendant's refusal to abandon the use of physical tests, height requirements, and written tests for the selection of police officers. This refusal can hardly be called a refusal to adopt a quota system. The court, in a companion case (Blake v. City of Los Angeles) found that the physical test and height requirement are prima facie violations of Title VII that must be justified by business necessity.

To sustain the granting of the preliminary injunction, the burden was on the defendant to demonstrate probable success on the merits and the possibility of irreparable harm. The District Court made no findings supporting issuance of the injunction. The loss of LEAA funds cannot be deemed irreparable injury in the absence of more convincing evidence (the defendant indicated that the primary effect of the loss of funds would be reassignment of certain officers participating in a program to combat street gangs). Congress deliberately imposed an automatic suspension of funding to achieve the purposes of the legislation by creating an additional incentive for compliance with the nondiscrimination provisions of the Safe Streets Act. Actions to enforce these provisions cannot be enjoined because defendant will be forced to expend much time and taxpayers' resources defending the action.

The court vacated and remanded under the standards set forth in Blake v. City of Los Angeles.

U.S. Court of Appeals - 9th Circuit
BLAKE v. CITY OF LOS ANGELES
19 FEP 1441 (1979)

FACTS: Plaintiffs brought a class action under Title VII, 42 USC 1983, and the 14th Amendment, alleging sex discrimination in the Los Angeles Police Department (LAPD). Prior to July 1973, LAPD maintained separate gender-based job classifications in entry level police positions. Men performed police patrol and could be promoted through all ranks; women performed tasks relating to women, children, desk duty, and administration. They were barred from regular patrols and were ineligible for promotion above the level of sergeant. In July 1973, LAPD abandoned the sex segregated job classifications and established a single entry level position of police officer. Lines of promotion were unified and identified entry requirements were imposed for both men and women. These included a 5'6" height requirement and a physical abilities test. In 1976, women comprised 2.08 percent (as opposed to 2.15 percent in 1973) of all sworn positions and 0.48 percent of all positions above the rank of sergeant.

The District Court held that defendant's actions before Title VII became applicable to governmental agencies (March 24, 1972) did not violate the Equal Protection Clause of the 14th Amendment because it was substantially related to and served the important governmental objective of providing an effective police force. The court held that the dual classification system in effect between the time that Title VII was applied to governmental bodies and its abolition on July 1, 1973, did not violate the act because its continuation was justified by business necessity. Regarding post July 1, 1973, actions, the court held that neither Title VII nor the 14th Amendment were violated because discriminatory intent was not shown. The District Court granted summary judgment for the defendant.

ISSUE: 1) May Title VII be constitutionally applied to State and local governments? (2) Did defendant's conduct before Title VII became effective violate Equal Protection? (3) Did defendants conduct after Title VII became effective require reversal of summary judgment for the defendants?

DISCUSSION: The Court of Appeals noted that the District Court had conceded that under Griggs, a prima facie case could be established by a showing of disparate impact but nevertheless, held that Congress had no power to impose on State and local governments anti-discrimination standards greater than those compelled by the 14th Amendment. Accordingly, proof of discriminatory intent would be required according to the District Court. The Court of Appeals rejected the premise that a statute can be no broader than its constitutional base holding that under applicable case law, it is enough that we may be able to perceive a basis for the legislation in the constitutional provision. Congress

specifically intended in amending Title VII in 1972 to apply the Griggs standards to State and local governments. Finding that the 1972 amendments were appropriate legislation to enforce the Equal Protection Clause, were plainly adapted to that end, and were consistent with the letter and spirit of the Constitution, the court upheld the application of Title VII to State and local governments.

Regarding the Equal Protection challenge to LAPD's practices before Title VII became effective, the court found that the undisputed evidence established that LAPD used a gender-based system of job classification. The court noted that classification by gender must serve important governmental objectives and must be substantially related to the achievements of those objectives. Administrative ease and convenience of the attempt to foster old notions of role typing have been held to be inconsistent objectives to justify such a classification. The court stated that assuming arguendo that qualities of size, strength and disposition are substantially related to the important objective of maintaining an effective police, it does not follow that women may constitutionally be excluded from serving as police officers. It must be demonstrated that women lack the requisite size, strength, and disposition to do the job. It is undisputed that not all women lack the requisite traits to be effective police officers as is proved by LAPD's experience after abolition of gender based criteria. The District Court's conclusion that there has to be only a substantial relationship between the relevant traits and gender is contrary to Supreme Court decisions holding that archaic and overbroad generalizations cannot justify statutes employing gender as an inaccurate proxy for more germane bases of classification. The court held that women could not be excluded unless the congruence between gender and possession of the traits is so great and the prospects of developing more accurate proxies for the traits are so small that the gender based classification cannot be said to be based on administrative ease or convenience. The court held that exclusion of all women from regular police patrol duties and from all positions above the level of sergeant violate Equal Protection. The District Court's summary judgment order was, accordingly, reversed.

Regarding plaintiff's Title VII allegations, the court, citing Dothard v. Rawlinson, found that the dual classification system used before 1973 could not meet Title VII standards in that it had a disparate impact on women. Thus, the burden shifted to the defendant to justify the use of these promotions after Title VII became effective. Defendant argued that the disparate impact was not as serious as it seemed because fewer women were interested in police work than men. The court rejected this argument as irrelevant in that the challenged qualifications disproportionately excluded women who were interested enough to apply. The lack of interest itself may be traceable to the use of selection devices which would disproportionately exclude women. There was no evidence that the use of sex segregated job classification was necessary to the safe and efficient operation of the LAPD. The fact that the department has successfully functioned since the dual classification was established suggests that the old system was not required by compelling business purposes. Holding that the challenged practices did not effectively

carry out the business purposes they were alleged to have served, and that there were less discriminatory alternatives available, the court found that the defendant did not carry its burden of overcoming plaintiffs' prima facie case of discrimination under Title VII concerning the period of March 24, 1972 - July 1, 1973.

After July 1, 1973, height requirements and physical abilities tests were found to have had disparate impact and plaintiffs, therefore, were found to have established a prima facie case of discrimination. (87% of women 5'6" or less were excluded, but only 20% of men; the physical abilities test served to exclude 50% of women but only 2.6% of men.) The court noted that to rebut a prima facie it is not enough that the device selects characteristics that may have some rational relationship to job performance; the practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge. Because the business necessity defense is very narrow, it is not easy for employers to demonstrate the job relatedness of selection devices shown to be prima facie violations of Title VII. Here, the justification fell short of showing that requirements were so closely job related that their use was necessary. It is essential that selection devices be validated by professionally acceptable methods or shown to be predictive of or significantly correllated with important elements of work behavior which compare or are relevant to the job for which the candidates are being evaluated. Employers must (1) determine what important elements of work behavior are, and (2) demonstrate that selection devices are predictive or significantly correlated with the elements of work behavior that have been identified as important. Great deference is to be given to EEOC's Guidelines. Although compliance is not mandatory, an employer's burden of justification is much heavier if the Guidelines have not been followed.

At most, defendant showed some rational relationship and not business necessity in this case. To demonstrate business necessity, defendant would have had to show that (1) subduing suspects with a minimum use of force is an important element of job performance by police as alleged by defendant, and that (2) height is so significantly correlated with minimization of force in suspect control as to be necessary to safe and efficient job performance. Assuming that (1) was proved, defendant failed to demonstrate that the height requirement was a business necessity. Specifically, the court found defendant's studies to be defective in that the definition of "strong force" was vague and did not contain statistics concerning anyone 5'6" or shorter. Plaintiff also cited standards showing that height bore no relationship to job performance. Further, the court held that plaintiffs had successfully challenged the methodology of studies concerning the physical abilities test. The court concluded that the fact that before 1973, defendants hired thousands of males without using a physical strength test suggests that the practice is not necessary to insure safe and efficient job performance. In reversing the District Court's grant of summary judgment for the defendant, the Court of Appeals noted that in Title VII, even if business necessity has been shown, plaintiffs may prevail if

they show that alternative selection devices that serve defendant's legitimate interest without discriminatory effect could have been used. This must be considered by the District Court.

The Court of Appeals reversed the grant of summary judgment concerning all issues and remanded for further proceedings.

Court of Appeals - 10th Circuit
SCHWAGER v. SUN OIL COMPANY
19 FEP 872 (1979)

FACTS: Plaintiff filed suit under the Age Discrimination in Employment Act (ADEA) alleging that defendant's reorganization plan was aimed primarily at older workers. In support of his claim, he introduced statistical evidence showing that the average age of employees retained as a result of the reorganization was 35 years while the average age of those terminated was 45.7 years. The District Court found that plaintiff's termination was based on reasonable factors other than age.

ISSUE: Is the standard of proof under ADEA the same as under Title VII as interpreted by McDonnell Douglas v. Green?

DISCUSSION: The Court of Appeals found that the purposes and structure of the ADEA and Title VII are similar and cited decisions of other circuits which applied Title VII standards to age discrimination cases, specifically the guidelines set forth in McDonnell Douglas v. Green. Thus, the court held that in this case, the plaintiff has established a prima facie case by showing that he or she is (1) within the age group protected by the statute; (2) was doing satisfactory work; (3) was discharged in spite of this; and (4) the position was filled by employees younger than plaintiff. (The court emphasized that this standard should serve as a guideline and is not to be applied inflexibly, but should be based on the facts in each case.) Once a prima facie case is established, the burden of going forward shifts to the defendant to show that reasonable factors other than age accounted for the termination. Plaintiff has the ultimate burden of establishing his case of age discrimination by a preponderance of the evidence.

Applying this standard, the court held that plaintiff had established a prima facie case in that 60 percent of his "territory" was taken over by employees substantially younger than 45 years of age. The court proceeded to find that the District Court's conclusion that plaintiff was terminated due to a company reorganization without regard to age was not clearly erroneous. Accordingly, the judgment of the District Court was affirmed.

Court of Appeals - 10 Circuit
EEOC v. NAVAJO REFINING COMPANY
593 F.2d 988 (1979)

FACTS: EEOC filed suit against defendant alleging national origin discrimination under Title VII. The record showed that when it found that its test was not considered valid by EEOC, it obtained another test and submitted it to OFCC, which had not validated it or rejected it at the time of the suit. The defendant made adjustments to equalize the raw scores of Spanish surnamed applicants and Anglos, resulting in less than a one percent difference in the average scores between these groups.

The District Court issued an injunction forbidding use of the test and awarded back pay to certain individuals although finding that the test as adjusted did not result in disparate impact.

ISSUE: Was the injunction properly issued and was the finding of liability under Title VII justified?

DISCUSSION: The Court of Appeals stated that to prove a prima facie case regarding a facially neutral practice, disparate impact must be shown. The court started with the proposition that Title VII does not impose on an employer the duty to favor a minority discriminated against in the past in order to correct pre-Act racial imbalances, the assumption being that non-discriminatory hiring practices will eventually rectify racial disparities in the employee population. The court found that since assuming control of the company, defendant had hired a larger percentage of Spanish surnamed individuals than existed in the relevant work force. Although there is a disparity between Spanish surnamed and Anglo individuals who have high school educations or who passed the test before the racial factor adjustment is made, the court need not reach that issue unless there is discrimination in actual numbers hired. Non-validated tests and subjective hiring procedures do not violate Title VII per se. Congress directed the thrust of Title VII to the consequences of employment practices. The defendant was free to impose the requirements mentioned above if the result is not discrimination in fact.

Accordingly, since defendant hired a higher number of Spanish surnamed employees than existed in the appropriate labor force, plaintiff did not prove a prima facie case of discrimination. The court reversed the judgment of the District Court with instructions to dissolve the injunction and vacate the awards of backpay.

Court of Appeals - 10th Circuit
MANZANARES v. SAFEWAY STORES
593 F.2d 968 (1979)

FACTS: Plaintiff filed suit for injunctive relief and damages under 42 USC 1981 alleging discrimination against Mexican-Americans concerning his discharge and subsequent reinstatement without seniority or back pay. Defendant moved for dismissal of the claim of national origin discrimination on the grounds that the protections of 42 USC 1981 are applicable only to race, color and alienage.

The District Court granted the motion to dismiss finding that relief under 1981 is available only for discrimination based on race or color.

ISSUE: Is plaintiff's allegation that he was discriminated against because he was of Mexican-American descent sufficient to permit a cause of action under 1981?

DISCUSSION: The Court of Appeals noted that the statutory provision in question makes no mention of race, national origin or alienage. The only reference is that "all persons" shall have described rights and benefits of "white citizens." The measurement under the statute is group to group. Plaintiff's allegation that discrimination was perpetrated against members of his group is sufficient to have withstood a motion to dismiss. It is apparent that the group described is sufficiently identifiable to permit comparison to "Anglos". The court concluded after reviewing the applicable case law that it can be concluded that 1981 is directed primarily to racial discrimination but is not limited to the technical or restrictive meaning of the word "race." The court, accordingly, reversed the judgment of the District Court and remanded for further proceedings.

Court of Appeals - 10th Circuit
RUTHERFORD v. AMERICAN BANK OF COMMERCE
565 F.2d 1162 (1977)

FACTS: Plaintiff filed suit against her former employer under Title VII alleging retaliation in that it informed a prospective employer that she had filed a discrimination suit after she had resigned. The District Court entered judgment for the defendant.

ISSUE: Does Title VII protect former employees against retaliation?

DISCUSSION: The Court of Appeals found that the defendant acted in a spirit of retaliation. Defendant claimed on appeal that Title VII did not apply in that at the time of allegedly discriminatory action, plaintiff was no longer an employee. The court rejected this argument on the grounds that such a narrow interpretation was not justified by the Act's legislative history and that a statute which is remedial in nature, should be liberally construed. The prohibition is far from remote and speculative because it is a fact of business life that employers almost invariably require references from previous employers.

The judgment of the District Court was reversed.

Court of Appeals - D.C. Circuit
DAY v. MATHEWS
530 F.2d 1083 (1976)

FACTS: The plaintiff, a government employee, filed suit in District Court under Title VII. The court held that plaintiff had been discriminated against. The court granted plaintiff retroactive promotion with back pay, discounting the defendant's argument that even absent the discrimination plaintiff would not have been promoted. The court found this "but for" test inappropriate to carry out the purposes of Title VII.

ISSUE: What is the appropriate relief in a Title VII case involving government employees?

DISCUSSION: The Court of Appeals held that the statute makes clear that retroactive promotion and back pay are available only when the employee would have recieved the promotion had he not been the victim of discrimination. It is plain from the case law that the purpose of a back pay award is to "make the plaintiff whole" - that is, to restore him to the position he would have occupied but for the discrimination. Therefore, unless the court finds that plaintiff would have been promoted, retroactive promotion and back pay is inappropriate relief. In remanding the case for a determination of whether plaintiff would have been promoted absent the discriminatory conduct, the Court of Appeals held that in such a case, the defendant must prove by clear and convincing evidence that plaintiff's qualifications were such that he could not in any event have been selected. This burden is proper because it is equitable that any uncertainty be resolved against the party whose action gave rise to the problem.

Court OF Appeals - D.C. Circuit
BARNES v. COSTLE

561 F. 2d. 983 (1977)

FACTS: Plaintiff, a women, filed suit alleging that shortly after the commencement of her employment at a Federal agency, the director of her division requested sexual favors such as the participation in social activities after working hours and the suggestion that an "affair" would enhance her career. Plaintiff alleged that as a result of her having rebuffed his advances, the director began a campaign to belittle and harass her, to strip her of job duties culmunating in the decision to abolish her position. She charged that these actions would not have occurred but for her sex.

The District Court granted summary judgment for the defendant, opining that plaintiff's allegations were not encompassed by Title VII. "The substance of (appellant's) complaint is that she was discriminated against, not because she was a woman, but because she refused to engaged (sic) in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious sexual relationship...it does not evidence an arbitrary barrier to continued employment based on ...sex."

ISSUE: Do the circumstances in this case present an allegation of sex discrimination cognizable under Title VII?

DISCUSSION: The Court of Appeals found that the 1972 amendments to Title VII extended the same guarantees against sex discrimination to Federal employees as it afforded to employees in the private sector. The Court held that in this case the retention of plaintiff's job was conditioned on her submission to sexual relations, an exaction which the supervisor would not have sought from any male. "It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men and which are not genuinely and reasonably related to performance on the job." The court held that to say that plaintiff was discharged simply because she declined an invitation is to ignore the asserted fact that she was invited only because she was a woman. Citing Phillips v. Martin Marietta 400 US 544, the court held that it is enough under Title VII that gender is a factor contributing to the discrimination in a substantial way. Here gender as much as cooperation was an important factor. The court concluded that the fact that not all female employees were affected is no bar to plaintiff's claim because the Title VII prohibition against sex discrimination is extended to individuals.

The Court of Appeals reversed the decision of the District Court and remanded for further proceedings.

Court of Appeals - D.C. Circuit
SHEHADEH v. C & P TELEPHONE COMPANY
595 F.2d 711 (1979)

FACTS: Plaintiff alleged that because of her sex and her husband's national origin, she was discharged, refused reinstatement, and was effectively barred from other employment by her former employer's persistent release to prospective employers of false and derogatory references.

The District Court dismissed the suit because the gravamen of the allegation was her discharge and that this matter was not raised in a timely manner.

The Court rejected complainant's theory of continuing discrimination and found that the negative tenor of the subsequent employment references was a natural outgrowth of the original termination.

ISSUE: Does plaintiff's allegation regarding derogatory references state a claim under Title VII?

DISCUSSION: The Court of Appeals noted that plaintiff alleged that the pejorative references were distributed deliberately and for invidious reasons. A complaint may only be rejected for failure to state a remediable claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The Court held that in this case, if it could be shown that the dissemination of derogatory information resulted from a discriminatory frame of mind, this would constitute new and independent acts of discrimination and not the mere outgrowth or effect of plaintiff's termination.

The court proceeded to find that the dissemination of adverse references was an unlawful employment practice under section 703(a) of Title VII noting that the denial of employment on the grounds of sex or national origin is as repugnant to the legislative goal of Title VII when induced by a former employer as when perpetrated directly by an employer with whom a job is sought. Accordingly, these allegations which were found to be timely were remanded to the District Court for further proceedings.

GLOSSARY

Constitutional and Statutory References

Constitutional Provisions

- Supremacy Clause - Article 6, Section 2 states: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land...."

- Case and Controversy - The Judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States...to Controversies to which the United States shall be a party; - to Controversies...between citizens of different States.

- 5th Amendment - The 5th Amendment provides that "no person... shall be deprived of life, liberty, or property without due process of law."

- 14th Amendment - provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws" [emphasis supplied].

Federal Laws

- 42 U.S.C. 1981 - This provides in part that "all persons...shall have the same right in every State...to the full and equal benefit of all laws...as is enjoyed by white citizens...."

- 42 U.S.C. 1983 - This provides that "every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or territory, subjects...any citizen...to the deprivation of any rights...shall be liable to that party injured in an action at law, suit in equity...."

- Title VII - Title VII of the Civil Rights Act of 1964 (42 USC 2000e), as amended by the Equal Employment Opportunity Act of 1972, prohibits discrimination in employment practices because of race, color, religion, sex, or national origin. It applies to labor organizations, employment agencies and most employers with 15 or more employees, including State and local governments and the Federal Government.

The Equal Employment Opportunity Commission (EEOC) is the Federal agency charged with enforcement of Title VII. EEOC has broad powers to investigate any charge filed with it. Where it finds reasonable cause to believe that there has been a violation of Title VII, EEOC is required to attempt "by informal methods of conference, conciliation, and persuasion" to reach a just settlement. Only after these informal methods fail is EEOC (for private employers), the Attorney General (for State and local governments), or the individual charging party authorized to bring suit in a Federal District Court.

Section 703(a) states that "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Under section 703(e) "... it shall not be an unlawful employment practice for an employer to hire and employ employees...on the basis of his religion, sex or national origin, in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise."

Section 703(h) provides that "Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system...provided that such differences are not the result of an intent to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice...for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid to employees...if such differentiation is authorized by the provisions of sections 206(d) of Title 29.

Section 703(j) specifies that "Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group

because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer...or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons...in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.

Section 704(a) states that it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Under section 706(g) (2000e-5), courts "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay..., or any other equitable relief as the Court deems appropriate."

o Age Discrimination in Employment Act (ADEA) [29 USC 623 et seq.]

Section 623(a) states that "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

Section 623(f) provides "It shall not be unlawful for an employer... (1) to take any action otherwise prohibited under subsection (a), (b)... of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual;. . .or shall require or permit the involuntary retirement of any individual specified

by [Section 631(a)] because of the age of such individuals; or (3) to discharge or otherwise discipline an individual for good cause and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) because of the age of such individual."

Section 631 of the Act limits its prohibitions to persons who are at least 40 but less then 70 years of age.

o The Fair Labor Standards Act

Section 206(d)(1) (The Equal Pay Act) provides that "No employer having employees subject to any provisions of this section shall discriminate...between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work or job, the performance of which requires equal effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on any other factor than sex..."

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